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MOBBING AS RETALIATION AGAINST WHISTLEBLOWERS

ABSTRACT: *Directive (EU) 2019/1937 of the European parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law prohibits retaliation against whistleblowers, particularly in the form of coercion, intimidation, discrimination, unfavorable or unjust treatment. This potential of relation to EU anti-discrimination legislation is not entirely clear. The current limited judicial practice from the Czech Republic still lacks clear answers. The aim of this paper is to assess and analyze the relationship between EU legislation on whistleblower protection and anti-discrimination legislation.*

Keywords: *whistleblower, retaliation, mobbing.*

1. Introduction

Mobbing is a form of hostile behavior occurring in the workplace. This social phenomenon is gaining more and more attention due to its adverse effect on the health and work performance of individuals who are exposed to it. However, the frequency and severity of the abuse of mobbing as retaliation against whistleblowers escapes increased public attention.

In order to bring about redress, it is necessary to understand the use of mobbing as a means of punishing whistleblowers, who are singled out and humiliated for their actions in an effort to prevent corrupt and illegal practices.

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The aim of this paper is to evaluate and analyze the relationship between EU legislation on the protection of whistleblowers and anti-discrimination legislation. Further this paper describes the forms and consequences of mobbing in the workplace, including its observable consequences for the victim (the whistleblower), his surroundings, and the overall negative impact on the society where such behavior occurs. Subsequently, it describes legislatively anchored measures serving to protect whistleblowers in the workplace at the level of the Czech Republic as well as related EU legislation.

These findings in the matter of mobbing of whistleblowers in the workplace, will help map the current situation of the use of bullying as a form of retaliatory measures against whistleblowers. They will also be useful to design sets of proposals and recommendations that can potentially lead to improvements in the area and contribute to increasing transparency, safety and fairness in the working environment, and to find an effective solution.

2. Non legislative view of mobbing, bossing and staffing as forms of bullying in the workplace

Mobbing has long been associated with bullying in the workplace, but in reality this word itself is closer to psychological abuse or psychological terror. An apt comparison was introduced into psychology as a pack attack on an intruder trespassing into a foreign territory (Lorenz, 1963). This situation was later compared to the behavior of people during workplace bullying (Leymann, 1990).

Later, mobbing came to be seen as bullying in the workplace between colleagues, together with bullying by superiors (Bossing) and bullying by subordinates (Staffing). All of these can be found under the collective name Bullying (Occupational Safety Research Institute of the Czech Republic, 2016).

Mobbing represents a systematic process directed against the victim, which at first glance may seem like pranks or small pranks to non-participants, but even if it does not show obvious signs of bullying in the true sense of the word, its effects on the psychological state of the victim can be immense and it is only a matter of time when the victim can no longer bear such treatment and breaks down psychologically.

The basic principles of mobbing are the iron regularity of attacks by the aggressor or their group and long-term pressure. The attacks are carried out subtly and covertly, but even so, it creates consistent pressure on the victim without the slightest sign of compassion, with the aim of harming

the victim, damaging her work results, mental state, private life and good reputation, whereby sooner or later she will be forced to leave her job position (Svobodová, 2008).

Other forms of workplace bullying are bossing and staffing. Bossing again means manifestations of bullying in the workplace, but in this case the master worker is the superior of the victim or victims. By this action, the latter usually seeks to enforce the subordinate's obedience, adaptation to his own intentions, or does so with a view to discouraging the subordinate worker from his job position, if not from the company as such (Chromý, 2014).

Indicators of bossing can include, for example, excessive control of work duties and behavior in the workplace, unjustified criticism, putting down or ridicule in front of colleagues, as well as the deliberate creation of psychologically demanding situations and limiting the necessary conditions for the proper performance of work, such as withholding key information, limiting the necessary resources etc. (Chromý, 2014).

The consequences of such tension will appear sooner or later, and thus the initiator of the coercion will gain additional ammunition, with which he can escalate the terror towards the subordinate or thus receive a valid reason to proceed to disciplinary measures, which are, however, suddenly justified and therefore the victim he loses the slightest chance of any support from his surroundings. Under these circumstances, it can be assumed that the victim will not endure this situation for long. Either he collapses, or he gives up and asks for a transfer of the place of work, or for the termination of the employment relationship (Ministry of Labour and Social Affairs of the Czech Republic, 2023).

On the other hand, staffing is a form of bullying where a superior worker is the victim and his subordinates play the role of aggressors. The motivations for their actions can be different, from jealousy of the success of a promoted colleague to a simple reluctance to accept a new superior who is supposed to replace their favorite former executive (Beňo, 2003).

However, his expressions are quite unambiguous. Together, the collective initiates the sabotage of the superior's activities. They can hide from him essential information necessary for decision-making processes, they can deliberately reduce the results of the departments entrusted to him, repeatedly file complaints about his dealings with them and, of course, boycott any of his efforts to resolve conflicts. Everything can eventually escalate, and even though the executive is significantly more stable in his position, he does not have many options to solve the situation. This fact can significantly affect his psychological health and negatively affect his further success at work (Chromý, 2014).

The common features of all types of workplace bullying, regardless of the relative position of the attacker and the victim, is the negative impact on both the work group or society where the bullying takes place, and of course also its victim. The consequence of bullying in the workplace for the company as a whole can be a decrease in productivity, i.e. a decrease in work efficiency, which will adversely affect the company's income and may cause damage to the company's reputation. This is also related to the more frequent absence of some employees, the weakening of work teams, and more employee resignations. If the company discovers the problem of bullying, it must invest significant resources in solving it (Ministry of Labour and Social Affairs of the Czech Republic, 2019).

On the other hand, the victims themselves are particularly affected by the psychological side of the bullying they have experienced. Dvaenportová described the consequences of bullying as a sleep disorder, inability to concentrate, irritability and a tendency for the victim to withdraw into herself. Depending on the time, this can progress to unhealthy weight fluctuations, a tendency to avoid the scene of bullying, depression, feelings of anxiety, up to the use of addictive substances to relieve the burden experienced, panic attacks and, in extreme cases, self-destructive tendencies. All accompanied by an effort to minimize the time of their stay in the place where the victim is exposed to bullying (Davenport, Schwarz & Elliot, 2005).

2. Legal protection of whistleblowers against bullying in the workplace in the Czech Republic

Until recently, there was no legal regulation in the Czech Republic preventing whistleblowers from retaliatory measures. Some laws, such as Act No. 198/2009 Coll., on equal treatment and on legal means of protection against discrimination and on the amendment of certain laws (hereinafter referred to as the "Anti-Discrimination Act") were devoted to it in more detail. Its task was to prevent discrimination against persons of different race, ethnic origin, religion, gender, age, sexual orientation, disability or belief (§2 Act No. 198/2009 Coll.).

Among these "disadvantaging" elements with the possibility of provoking a discriminatory reaction from the surrounding area, whistleblower activity can also be counted to a certain extent. A law to protect whistleblowers was being prepared for a long time in the Czech Republic, but it was not successfully voted on several times. However, sooner or later its approval was inevitable due to the increased interest of the European Union in this

particular legislative regulation. Indeed, in October 2019, the Union adopted Directive (EU) 2019/1937 of the European Parliament and Council on the protection of persons reporting violations of EU law (hereafter referred to as Directive 2019/1937) and strove for its implementation in the legislation of the member states.

Directive 2019/1937 requires Member States to establish effective reporting channels and to introduce effective measures to protect whistleblowers from reprisals. The aim of these activities is to create an environment in which, if they have a well-founded suspicion about the progress or planning of an illegal act, they can report this fact without fear of imminent retaliatory measures. Until recently, there was no legal regulation in the Czech Republic preventing a similar situation as until recently for the issue of whistleblowers, however, continues to apply in the field of workplace bullying.

In the Czech Republic, there is no specific law that deals exclusively with the problem of workplace bullying, however motivated. When dealing with this situation, employers are thus dependent on tracing and deriving from other legal regulations, such as Act No. 262/2006 Coll., the Labour Code (hereinafter referred to as the “Labour Code”), Act No. 251/2005 Coll., on Labour Inspection, the Anti-Discrimination Act or Act No. 89/2012 Coll., the Civil Code (hereinafter referred to as the “Civil Code”). Bullying can be indirectly found in these regulations in §4 and §4a of the Labour Code, which determine the legislation governing labour relations (§4 Act No. 262/2006 Coll.).

Furthermore, the issue of bullying in the workplace is marginally dealt with by §301 of the Czech Republic Labour Code, which obliges employees to make appropriate efforts in the performance of work, quality performance during working hours, compliance with the law and responsible treatment of the employer’s resources and interests, i.e. also with their colleagues, because intentionally negative influencing other colleagues is certainly against the interests of the entire company and therefore also of the employer (§301 Act No. 262/2006 Coll. Czech Republic Labour Code). Subsequently, §302 of the Labour Code specifically obliges superiors to “create favorable working conditions and ensure safety and health protection at work” (§302 Act No. 262/2006 Coll.).

In the Czech Republic, following the mentioned EU directive, on 1 August 2023, the new Act No. 171/2023 Coll., on the protection of whistleblowers (hereinafter referred to as “171/2023 Coll.”) came into force, which should hopefully finally bring order to this issue.

The law clearly defines a notification as the transmission of information about a possible illegal act, the originator of which is a person with whom the

whistleblower is or has historically been in an employment relationship. This act has the characteristics of a criminal offense or a misdemeanor punishable by a fine of up to CZK 100,000, or violates this law or other European Union legislation in selected areas (§2 Act No. 171/2023 Coll.), but at the same time contains certain exceptions which, according to this Act, cannot be regarded as notification of illegal activity (§3 Act No. 171/2023 Coll.). These can be, for example, obligations to ensure confidentiality in the performance of certain professions or to preserve the protection of information. At the same time, the law warns against communicating facts that could threaten the important security interests of the Czech Republic (§3 Act No. 171/2023 Coll.).

The law also clearly defines the retaliatory measures against which it is tasked to protect whistleblowers. Specifically, these are actions or omissions in connection with the whistleblower's work or activity motivated by his decision to report, and which have the potential to cause harm to the whistleblower. Specific examples include invasion of privacy, restriction of information, intentionally disproportionately negative assessment of work performed, unjustified changes to the place of work, job description or remuneration for work performed and, of course, unjustified termination of employment. In addition to the whistleblower, his relatives, colleagues, subordinates and employers, legal entities and projects related to the whistleblower are also protected by law from these expressions (§4 Act No. 171/2023 Coll.).

There are also mechanisms for the protection of the whistleblower, which he acquires when the whistleblower uses the methods of submission in the specified manner and to the specified authorities (§7 Act No. 171/2023 Coll.). In a prescribed manner, we mean the internal reporting system that the law requires mandatory entities such as public procurement contractors, companies with more than 49 employees or public authorities performing activities in the field of civil aviation, maritime transport or activities in the oil and natural gas sector to set up (§ 8 Act No. 171/2023 Coll.).

With this system, the obliged entities are supposed to help make it easier for whistleblowers to file a report, and at the same time, in this event, the establishment of an authorized person is expected, who will be responsible for the proper handling of the submitted reports. Its task will be to communicate with the appropriate authorities regarding the procedure for investigating received notifications and to inform the notifier back about the progress of the process according to the appropriate measures (§9 Act No. 171/2023 Coll.).

The law also establishes in §10 the conditions for the selection of an authorized person, his duties when performing this position, including the handling of the notification received and the choice of subsequent procedures

for its verification or handing over to the responsible authorities (§11 Act No. 171/2023 Coll.) and the rights of the employer when choosing it. In the same way, the procedures of the Ministry in relation to the receipt and investigation of notifications, communication of information, archival activities and control activities are determined by law (Chapter 3 Act No. 171/2023 Coll.).

Last but not least, the law sets the rates for offenses for all parties involved who would attempt to distort or otherwise abuse or contradict the measures or procedures established by the law in any way. These rates can reach up to a million Czech crowns, if they are revealed and proven (Part 4 Act No. 171/2023), because it is he who should ensure the safety of his subordinates and resolve the situation (§302 of Act No. 262/ 2006 Collection).

In contrast, the Anti-Discrimination Act in the Czech Republic focuses much more on manifestations of discrimination and bullying, which it describes in more detail for its purposes. The law defines the differences between direct and indirect discrimination, what behavior similar to discrimination is objectionable and, conversely, what is considered permissible under specific conditions (§2 to §7 Act No. 198/2009 Coll.).

However, the common feature of both regulations is the prohibition of neglecting or discriminating against the persons for whose protection the law was created in the work environment, and the fulfillment of these protective measures is mandated by both laws to the employer. In other words, the employer is obliged to ensure equal conditions for all its employees without distinction, and in the event of a violation of their integrity, it is forced to resolve the situation in accordance with the procedure established by law.

However, unlike the Act on the Protection of Whistleblowers, the Anti-Discrimination Act in §14 amends Act No. 99/1963 Coll., the Code of Civil Procedure, in its updated version and thus allows for the so-called reversal of the burden of proof. In principle, this act consists in the fact that if the plaintiff manages to present to the court facts from which it can be deduced that the plaintiff has been a victim of discrimination, it is up to the defendant to convince the court that there was no discrimination and that the principle of equal treatment was not violated treatment (§14 Act No. 198/2009 Coll.).

If the whistleblower feels exposed to bullying at the workplace and intends to resolve the situation, he must first report this fact and its circumstances in appropriate places in an appropriate manner. The essence of bullying as defined in §4 paragraph 2 of Act No. 171/2023 Coll. must also be fulfilled. The law directly names termination of employment or restriction of performance of service, demotion, imposition of disciplinary punishments, change of job classification, change of place of employment, but also not

allowing professional development, unauthorized request of medical reports, or unauthorized interference with the privacy of persons (Article 1 §4 of Act No. 171/2023 Coll.), further §27 paragraph 2 of Act 171/2023 Coll. exposes the whistleblower or a person close to him to retaliatory measures, or allows retaliatory measures against the whistleblower or a person close to him (§27 par. 2 and 4 of Act No. 171/2023 Coll.).

Whoever commits one of these offenses and it is proven that he was motivated to commit it by filing a report, may be punished according to §27, paragraph 7 of Act No. 171/2023 Coll. by a fine of up to CZK 1,000,000 from the labour inspectorate (except, for example, at the Ministry of the Interior of the Czech Republic (MVČR), where the labour inspectorate would need permission from the MVČR to investigate, if the inspectorate does not receive it, the matter will be investigated by the Ministry of Justice of the Czech Republic).

However, the question arises to whom to report anti-whistleblower bullying? It is the correct procedure to contact the authorized person again following a violation of §2 paragraph 1 d) point 11 of Act No. 171/2023 Coll. or a superior worker/employer and inform him that there is a violation of §301 of the Labour Code? Act No. 171/2023 Coll. does not directly mention the reporting of retaliatory measures, however, the retaliatory measures will meet the statutory conditions for filing a report according to §2 of Act No. 171/2023 Coll.. Subsequently, the report would be accepted by the relevant person and proceed in the same way as for the acceptance of a normal report on illegal activity according to §12 of Act No. 71/2023 Coll. The whole matter would then go to the Ministry of Labour and Social Affairs, which would impose corrective measures on the company and set deadlines for their implementation with the possibility of inspection by the labour inspectorate (§22 of Act No. 171/ 2023 Coll.).

However, the remedy itself will have to be arranged by the superior worker or the employer, whose obligation this is also according to §302 of the Labour Code. The second option is to look for a direct superior or employer in order to solve the situation (especially if it is specifically a case of bossing) and leave out the whistleblowing manager. After all, problems regarding bullying should also be reported to the superior in accordance with the instructions from all manuals on the issue of bullying issued by the Ministry of Labour and Social Affairs. The superior worker is obliged to ensure favorable working conditions according to §302 of Act No. 262/2006 Coll., which undoubtedly solves workplace bullying and prevents retaliation among employees.

Omitting the whistleblowing manager from the entire process could act as a certain form of simplification. On the other hand, no third party would be involved in the events and therefore no form of objective control from the external environment of the organization could occur. At the same time, a whistleblowing manager would probably be able to investigate the whole situation more objectively than a senior employee, but without more specific knowledge about the common methods and wider contexts in his usual operation.

Therefore, the authors' opinion in this case is that the best possible course under the current circumstances is to report the ongoing retaliation to both. This should lead to an acceleration of the entire correction process on the part of the manager and at the same time to an objective assessment of the whole situation by the whistleblowing manager, which could be especially useful in the event that the aggressor or one of them is a superior employee. At the same time, in this way, external control over compliance with the adopted measures would be guaranteed and everything would be approached according to the defense measures established by Act No. 171/2023 Coll. to protect whistleblowers.

3. Mobbing in the workplace and Directive (EU) 2019/1937 of the European parliament and of the council of 23 october 2019 on the protection of persons who report breaches of Union law

Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 october 2019 on the protection of persons who report breaches of Union law makes demonstrative enumeration of retaliation forms against whistleblowers on workplace:

- a) suspension, lay-off, dismissal or equivalent measures;
- b) demotion or withholding of promotion;
- c) transfer of duties, change of location of place of work, reduction in wages, change in working hours;
- d) withholding of training;
- e) a negative performance assessment or employment reference;
- f) imposition or administering of any disciplinary measure, reprimand or other penalty, including a financial penalty;
- g) coercion, intimidation, harassment or ostracism;
- h) discrimination, disadvantageous or unfair treatment;

- i) failure to convert a temporary employment contract into a permanent one, where the worker had legitimate expectations that he or she would be offered permanent employment;
- j) failure to renew, or early termination of, a temporary employment contract;
- k) harm, including to the person's reputation, particularly in social media, or financial loss, including loss of business and loss of income;
- l) blacklisting on the basis of a sector or industry-wide informal or formal agreement, which may entail that the person will not, in the future, find employment in the sector or industry; m) early termination or cancellation of a contract for goods or services; n) cancellation of a licence or permit;
- o) psychiatric or medical referrals.

According to authors of this paper refers to bossing forms of retaliation mentioned in points: a), b), c), d), e), f), i), j), k), l), m), n), o). According to authors of this paper refers to bossing forms of retaliation as well point h):

h) discrimination, disadvantageous or unfair treatment.

However discrimination can be in some cases supported by mobbing. So, bossing and mobbing can be combined in this case.

While g) coercion, intimidation, harassment or ostracism;

Can be also related to bossing, however can be also in form of clear mobbing while ostracism is quite clear form of mobbing (however can be supported by boss as well).

Ostracism is very sophisticated tool against whistleblowers since it is very hidden and in some cases almost "invisible" form of mobbing.

"Ostracism means being ignored and excluded by one or more others. Despite the absence of verbal derogation and physical assault, ostracism is painful: It threatens psychological needs (belonging, self-esteem, control, and meaningful existence); and it unleashes a variety of physiological, affective, cognitive, and behavioral responses" (William 2011).

4. Future research directions

In the future, it is necessary to evaluate in which cases it is appropriate for whistleblowers to refer to anti-discrimination or whistleblower protection legislation, especially in potential lawsuits, or whether these protections can be combined and in which cases.

5. Conclusion

Based on the knowledge gained from the available legislation and mentioned court case study, it follows that employers should implement internal reporting systems appropriately as soon as possible and select persons responsible for their management. Alternatively, the persons responsible for managing the information channels for all employees, who through them will have the opportunity to educate themselves not only in the matter of reporting and applicable protective measures, so that in theory, in the event of the need to report an illegal act, they would not have to be exposed to such a dilemma as to whether procedures at all, due to fears of impending retaliatory measures. They can also get some sort of overview of the sanctions they face if they participate in any form of retaliatory measures; this would also lead to awareness of the issue of whistleblowers as such. If employees take whistle-blowing activity as a completely normal matter, the aim of which is to defend the interests of the company, and not as an attempt to compromise them or their colleagues, the overall tendency of the work collective to resort to retaliatory measures will also decrease, according to the author. Also, another measure that could be beneficial for companies could be a comprehensive crackdown on and investigation of workplace bullying. For this purpose, employees should be properly trained, who, similarly to the internal information channels for reporting, would receive warnings about ongoing bullying, verify their relevance and, if the truth of the claim is proven, deal with the situation. Although this would incur costs for the establishment and operation of such a workplace, if handled correctly, tendencies towards bullying in the workplace could be suppressed, regardless of its causes, which would have a positive impact on the entire company. Such an approach to workplace relations would undoubtedly send a clear signal about corporate policy and management's relationship with employees and their interpersonal relationships.

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MOBING KAO ODMAZDA PROTIV UZBUNJIVAČA

APSTRAKT: Direktiva (EU) 2019/1937 Evropskog parlamenta i Saveta od 23. oktobra 2019. o zaštiti lica koja prijavljuju kršenja prava Unije zabranjuje odmazdu protiv uzbunjivača, posebno u vidu prinude, zastrašivanja diskriminacije, nepovoljnog ili nepravednog tretmana. Ovaj potencijal odnosa prema antidiskriminacijskom zakonodavstvu EU nije mnogo jasan. Dosadašnja skromna sudska praksa iz Češke Republike još uvek nije u mogućnosti da pronade takve odgovore. Cilj ovog rada je da se proceni i analizira odnos između zakonodavstva EU o zaštiti uzbunjivača i antidiskriminacionog zakonodavstva.

Ključne reči: uzbunjivač, odmazda, mobing.

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