

When the Labor chamber of the Cour de Cassation shows that it can set limits on employers' obligation to ensure the safety of their employees in the workplace...

While I have been critical of the Labor Chamber of the Cour de Cassation (French Supreme Court) in a very recent article, its decision of October 8, 2014 (n° 13-20.070) provides a good reason to regain hope in the soundness of its analysis of employers' liability and reminds me that humor is the best cure for anything. Labor and employment - definitely a wonderful practice primarily because of its fundamentally human dimension - can sometimes bring smiles as employers are likely to face such a variety of amazing and outlandish situations.

A salaried pharmacist was dismissed for gross misconduct by his employer, Carrefour Hypermarchés, for having taken off his trousers and his underpants in the accounting office and exposed his genitals to the persons present in that office.

In a judgment dated April 23, 2013, the Court of Appeals of Paris held that:

- This act resulted from “a punctual and isolated moment of distraction, not from a conscious and deliberate exhibitionist behavior”;
- “The description of the incident [!] by those who witnessed the scene confirmed the absence of a deliberate intention on the part of the employee; such witnesses having only expressed their astonishment, not a reaction of shock that would have resulted from a deliberate act of exhibitionism[!];
- In these conditions of a strange behavior[!], **it was up to the employer to request the opinion of the occupational physician on Mr. X's ability to continue exercising his job;**
- Such an opinion was all the more necessary since the employee had told his employer that he was

suffering from anterograde amnesia[!];

- The dismissal was thus premature!
- And consequently without cause

In other words, for the Court of Appeals of Paris, showing one's genitals to women colleagues was not to be considered as a misconduct insofar as the employee did not recall the "incident" at all, an incident which was thus to be viewed as an involuntary act and a "strange behavior"!

As such, this "strange" - but not abnormal (!) - behavior should have alerted the employer who, as the one responsible for the physical and mental health of its employees, should have directed the employee to the occupational physician....

The Court of Appeals of Paris - that consisted exclusively of women judges - concluded from the gathered testimonies that the female employees who witnessed the scene had declared that they became speechless... which the Court interpreted as an absence of proof that they had suffered a shock. And it seems that the absence of any intention to "expose himself" was inferred by the Court from "*all the circumstances*" which were not detailed in the judgment....

As such, it was up to the employer to take action and to provide care for this poor pharmacist who, in pulling-down his trousers before his colleagues, could only be in a state of pain!!

Court decisions are sometimes as puzzling as the underlying facts...

As the Labor Chamber of the *Cour de Cassation* has always had a very strict position on employers' obligations with respect to the health of employees, there were reasons to fear that it would support the Court of Appeals and impose on all employers the obligation to detect any "strange behavior" of their employees.

Quite fortunately, the Labor Chamber of the *Cour de Cassation* quashed the judgment of the Court of Appeals of Paris. It considered that the appellate court had entered a judgment against the employer based on motives that were not sufficient to exclude the possibility of a gross misconduct on the part of the employee, as the latter had been declared fit for work just a few months before the "incident" and as it was not established, nor even alleged, that the employer had knowledge of the employee's mental condition (in particular since nothing had been evidenced about the employee's mental health... except for his own declaration on his amnesia!!).

The life of employers is not a long, quiet river! Yet, there is now at least one "strange behavior" in the workplace that they may sanction!



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