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Use of Indirect Evidence Approved by Supreme Court for Sexual Harassment Cases

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Plaintiffs alleging sexual harassment may use indirect evidence to prove their cases, the Swiss Supreme Court has held. Such indirect evidence can include evidence of previous complaints made by the victim to various persons or of plaintiffs having received counselling prior to termination of employment, as well as conclusions of doctors and court-appointed experts.¹ The Court made this decision, it said, because acts of sexual harassment by their nature are rarely openly committed in front of witnesses.

In the case, *Y*, a male employee, had been hired to work as a “Country Manager” at the Geneva-based mail delivery *Company X S.A.* as of July 1, 2003. *A*, one of the two female co-directors of the company, had personally hired *Y*. Later that year, *Y* had contacted a human resources expert and informed her of the problems that he was having with *A*. Although hesitant to provide specific details, *Y* nevertheless revealed that *A* had sexually harassed him, in particular embracing him, pushing him against the wall, and sending him a mobile phone message of a “roguish, sexual nature”.

In November of the same year, *Y* similarly indicated to several persons, including *D*, a human resources consultant, that he had become an object of sexual harassment by *A*, his superior, who was making sexual advances towards him, and that he was afraid that his rejection of her advances would lead to dismissal. *Y* also complained about sexual harassment to his doctor, indicating that when he rejected advances from *A*, she resorted to acts of physical aggression, pushing him against the wall and placing herself on him imitating an act of intercourse.

At the end of November 2003, *Company X S.A.* terminated the employment contract with *Y*. The reasons cited for the termination were his lack of communication, his lack of interest in the work and in the development of the company, and finally his negative attitude toward his colleagues, which allegedly created a climate that made further collaboration with him impossible. Following his termination, *Y* started legal action against *Company X S.A.*, in particular for compensation of damage caused by abusive termination of employment² and damage for mental distress.

The evaluation of *Y* by an expert in psychiatry appointed by the Geneva Labour Court of first instance (*le Tribunal des prud’hommes*) confirmed that his depressive condition was part of

symptoms usually associated with victims of various forms of harassment, allowing a causal link to be drawn between this condition and the past events at the workplace. Both the Court of the first instance and the Court of Appeal subsequently ruled in *Y*'s favour, awarding him the maximum financial compensation for abusive dismissal (the equivalent of six months' salary) plus an indemnity of CHF 10,000 for mental distress.

The Swiss Supreme Court confirmed the lower Courts' decisions, pointing out that despite the absence of direct witnesses, the acts of sexual harassment committed by *A* had been proven by *Y*'s repeated complaints to various persons and his attempts to seek counselling *prior* to the termination of employment, which excluded the possibility, the court opined, that *Y* acted merely to build up his court case. Furthermore, both the doctor and the court-appointed expert made consistent statements, confirming without any possible doubt that the depressive condition of *Y* had been caused by acts of sexual and psychological harassment, the court stated. Given the absence of any proof to the contrary, the Supreme Court viewed the alleged professional omissions of *Y* as merely a pretext for his termination.

¹Decision 4P.214/2006 in *X. S.A. v. Y.*, December 19, 2006, appearing at <http://www.bger.ch/fr/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm>. To find the decision, type "4P.214/2006" in the box headed "Autres arrêts dès 2000" and press enter, then click on the link below to access the judgement.

²Article 336a of the Swiss Code of Obligations (CO), available in French at <http://www.admin.ch/ch/f/rs/2/220.fr.pdf>).

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