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DISCIPLINARY RESPONSIBILITY ISSUES IN COVID-19 PANDEMIC ENVIRONMENT

Ірина Шопіна, Сергій Тарасов. ПРОБЛЕМИ ДИСЦИПЛІНАРНОЇ ВІДПОВІДАЛЬНОСТІ В УМОВАХ ПАНДЕМІЇ COVID-19. У статті визначено особливості дисциплінарної відповідальності в умовах пандемії коронавірусу COVID-19. Запропоновано поняття дисциплінарної відповідальності за порушення трудової дисципліни як правовідносин, в яких відбувається поєднання двох моделей поведінки суб'єктів правовідносин: а) правомірної, яка втілюється у бажаних для суспільства, держави, підприємства (установи, організації) діях, що тягнуть за собою заохочення; та б) неправомірної, яка уявляє собою порушення правових приписів, якими визначено обов'язки, заборони та межі повноважень вказаних суб'єктів, що тягне за собою застосування особливої міри адміністративного примусу – дисциплінарного стягнення.

Підставою дисциплінарної відповідальності запропоновано вважати службове правопорушення і охарактеризовано його сутність.

До особливостей трудових відносин в умовах пандемії коронавірусу COVID-19 віднесено наступні: а) наявність правових прогалин у регулюванні трудових відносин в аспекті забезпечення самоізоляції працівників, які мали контакт з пацієнтом з підтвердженим випадком COVID-19; б) наявність проблем, пов'язаних із приховуванням працівниками факту коронавірусної хвороби у них або у членів їх сімей, з якими вони постійно мешкають; в) правову невизначеність щодо ухилення працівників у разі наявності достовірної інформації щодо можливості зараження COVID-19 від медичного огляду і тестування, якщо працівник виконує функції, які передбачають контакти з іншими особами; г) проблеми у розумінні правомірності відмови працівника, діяльність якого передбачає активні соціальні контакти, від проведення вакцинації. ґ) проблеми правового регулювання поведінки осіб, які відмовляються користуватися засобами індивідуальної гігієни під час виконання своїх трудових обов'язків, пов'язаних з контактами з іншими особами.

З'ясовано, що за своїм змістом умисне поставлення інших осіб під час виконання особою трудових обов'язків під загрозу зараження коронавірусною хворобою COVID-19 уявляє собою неналежне виконання їх службових обов'язків і може тягнути за собою дисциплінарну відповідальність. Такий дисциплінарний проступок має ознаки винності та небезпечності і уявляє собою свідоме порушення встановлених обмежень.

Ключові слова: *трудові правовідносини, трудова дисципліна, службова дисципліна, дисциплінарна відповідальність, дисциплінарні статути, пандемія COVID-19.*

Relevance of the study. Significant changes in the labor market have exacerbated during the economic crisis caused by the COVID-19 pandemic, requires a revision of the content of disciplinary responsibility. This could happen due to changes in the structure of labor and also because of production decline in most types of economic activity, which in its turn caused an increase in the unemployment rate. According to the State Statistics Service of Ukraine, the profit of large and medium-sized enterprises for January-September 2020 amounted to 411.8 billion, or 90.5% compared to January-September 2019, losses were incurred in the amount of UAH 318.5 billion (or 283,9%). The share of unprofitable enterprises for the same period

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amounted to 34.8% (for January-September 2019 - 22.7%) [1]. Some studies say that in certain types of economic activity the decrease in the number of employed people can reach 1224.5 thousand people [2].

In this conditions, enterprises, institutions and organizations are forced to rapidly change the traditional forms of labor organization. According to a study by the sociological group "Rating", as of March 2020, 29% of interviewed have been working remotely [3]. Significant changes in the organization of work affect the understanding of the essence of disciplinary offenses and disciplinary responsibility. This determines the relevance of the topic of this article.

Recent publications review. The issue of the essence of disciplinary responsibility was considered in the studies of the following scientists: A. Andrushko, I. Borodin, V. Venediktov, S. Venediktov, M. Inshin, V. Kostyuk, O. Luk'yanchikov, K. Melnik, S. Prilipko, V. Sereda, V. Shcherbina, O. Yaroshenko and others. The problems of applying disciplinary measures for certain categories of workers and civil servants have been investigated by many national scientists, such as: V. Zaborovskiy, T. Vilchik, I. Kartuzova, Y. Kartuzova, T. Kovalenko, O. Chumak and others. Meanwhile, it should be noted that disciplinary responsibility in the context of the transformation of the work organization system due to the COVID-19 coronavirus pandemic has not yet been sufficiently covered. In scientific works devoted to the impact of the COVID-19 pandemic on the sphere of legal relations [4, 5], insufficient attention was paid to the essence of disciplinary responsibility in the new conditions. Thus, it can be concluded that at the present it is necessary to conduct scientific research in the sphere of COVID-19 influence on labor relations, as well as on the understanding of disciplinary responsibility.

The article's objective is to determine the specifics of disciplinary responsibility in the context of the pandemic COVID-19.

Discussion. Quite often there is a situation when the employees during performance of their professional duties commit violations of labor discipline. Despite the presence or absence of grounds for bringing a person to criminal, administrative or civil liability, there still remains the possibility for bringing the offender to disciplinary responsibility in labor relations.

However, unlike the codified law that applies in cases of criminal, civil and administrative faults, the situation in the area of disciplinary responsibility is not so straightforward. The Institute of Disciplinary Responsibility, as part of Ukraine's labor legislation, contains all weaknesses associated with the eclectic nature of the labor law rules, which were adopted at different times, for different purposes and are characterized by an extremely high degree of inconsistency. It should be reminded that the Criminal Procedure Code of Ukraine was adopted in 2012, the Civil Procedural Code of Ukraine – in 2004 (with last amendments in October 3, 2017), the Criminal Code of Ukraine – in 2001 and the Civil Code of Ukraine – in 2003 . There are peculiarities of the socio-political situation in Ukraine, the development of other legislative branches and international obligations of Ukraine mostly taken into account in these legal acts.

Instead, the Labor Code of Ukraine remains valid for almost 50 years, since 1971. Of course, this Labor Code has been amended many times, but in fact it became a stale document by its structure and incapable of combining required norms, that would allow the adequate responses to the current challenges. Changes to the Chapter X «Labor Discipline» of the mentioned Labor Code of Ukraine were last introduced more than 15 years ago (in 2003) and the overwhelming majority of the articles of this chapter are set out in the wording of 1971-1992 [6].

It is clear that the obsolete legal regulation has negative affect on the disciplinary practice. Therefore, we should try to find out the essence of disciplinary responsibility.

First, the Labor Code of Ukraine does not allow getting a full content idea of the «discipline» category (or «labor discipline»). Article 140 says that labor discipline in institutions and organizations is ensured by the creation of the necessary organizational and economic conditions for the high-performance work, a conscious attitude to the work, methods of persuasion, education and encouragement for conscientious work. An atmosphere of intolerance to violations of labor discipline and strict social demands on workers with dishonest performing their labor duties are created in the labor collectives. Regarding individual unscrupulous workers, disciplinary and public actions are applied in necessary cases [6].

However, as it can be seen from the analysis of the above mentioned statements, they determine the conditions for labor discipline achievement, but not the discipline itself.

At first glance, the idea of its content might be taken from the analysis of Article 119 of the Labor Code of Ukraine, which states that «employees are obliged to work honestly and in good faith, to comply with the instructions of the owner or his authorized body timely and accurately, to obey the labor and technological discipline instructions and labor protection re-

quirements, and to take good care of the owner's property». However, from the formal logic point of view, the analysis of this definition only allows us to compile a list of phenomena that are equally mentioned along with the category of «labor discipline», but not covered by its content.

Thus, in order to find out the essence of labor discipline, we should refer to the theoretical sources.

V. Prokopenko offers the following definition of the mentioned concept: «Labor discipline is a settlement of relations among participants in the labor process that determines the exact fulfillment of their labor functions by law» [7]. This definition generates a number of questions, in particular, on the nature of the labor process.

The «labor process» is originally an economic category; in economic sciences it is understood as technically determined and well-organized process of human application of mental and physical effort to obtain a useful result. In another words it's the process of transformation of available resources into the necessary (socially useful) values and benefits [8]. As the analysis of the above definition shows, the labor process encompasses, first of all, an individual (independent) work, which in its turn raises the question: among whom these relations are formed? What kind of relationships are raised applying human efforts? In our opinion, this combination in one definition of legal and economic categories makes it difficult to understand.

It should be also mentioned that in the economic science there were attempts to define the labor process through the prism of managerial relations: so, labor management processes is understood as the time spent to accomplish formal functions required for organization and improvement of employees activity. This is the time management, assistance delivery, morale building activities, briefing activities, labor team building, logistic support, informal work assessment, feedback, informal distance learning and other actions which motivate people and encourage creative approach [9].

It sounds reasonable and valuable in the context of economic science. At the same time it should be noted that from the viewpoint of law it combines a great number of non-legal categories, such as assistance delivery, informal work assessment and informal distance learning.

Similarly, an attempt to find out the essence of the labor function, which is closely related with labor discipline concept, discovers a few elements that are not regulated and should not be regulated by law.

According to V. Glossman, labor function – is an organic combination of objective and subjective factors, which are formed from business proficiency. Objective factors comprise established by the state standards that regulate the professional and qualification profile for production. And subjective factors include a set of knowledge, skills, experience and qualification training for particular profession or specific position, as well as employee competences [10].

As a benchmark for further development this definition is quite applicable, but in this research it is referred to disciplinary responsibility, which is brought to employees in case of violation of their labor discipline. Should an officer with authority to apply disciplinary sanctions always find out what kind of knowledge, skills, experience, qualifications, cognitive and emotional qualities a certain employee has in order to make any disciplinary record? In our opinion, this would completely degrade the institute of disciplinary responsibility, the value of which also include the ability for quick restoration of social justice in the field of labor relations, bringing the person who committed the offense to the specified form of legal responsibility. We believe that the decision-making process to bring an employee to disciplinary responsibility should be simple enough (it prevents possible mistakes), transparent (it prevents possible abuses) and rapid (it allows using the preventive functions of disciplinary responsibility at full extend as a means of reducing the crime level in a certain area of social relations).

Other scientific sources give us variety of labor discipline definitions; their analysis also indicates the presence of non-lawful elements. For example, labor discipline is defined as a set of legal norms regulating internal labor routine and establishing the labor rights and obligations of the parties to the employment contract, as well as encouragement the success and responsibility for intentional non-fulfillment of labor duties. The main content of labor discipline is not only the implementation of legal norms in the labor field, but also conscious and creative attitude to work, ensuring high efficiency, time management, the desire for cooperation and mutual respect [11].

The first part of this definition contains purely legal elements; instead, any attempt to interpret the meaning of labor discipline entails the usage of explanation elements from other sciences (social, psychology, sociology, etc.). But in our case we it is required to apply a certain

definition in disciplinary practice. Is it possible to impose a disciplinary penalty on employee who has done his job but without any creativity or mutual respect? In our opinion, this kind of situation leads to the sphere of ethical norms, which should be distinguished from legal ones.

Another problem in determining the category of «discipline» concerns its excessively narrow understanding. Such an approach can be found in the Disciplinary Statute of the Armed Forces of Ukraine [12]. This Disciplinary Statute defines the military discipline as strong observation by servicemen of rules and regulations established by the military charters and other legislation of Ukraine. As can be easily seen, this definition covers only one narrow aspect of huge, complex system of obligations and prohibitions.

But there is some contradiction with the term «observation» in that definition, which in the theory of law is traditionally understood as a form of implementation of prohibitive legal norms, when subjects of public relations are prohibited from committing unlawful actions in a certain area [13], as a passive form of legalization, which consists in refraining from actions that are under a legal prohibition [14]. In this case the new question arises: why the legislator did not consider that, in addition to refraining from prohibited acts, servicemen of the Armed Forces of Ukraine still have to perform their duties?

As it is well known, based on the subject manner there are following forms of law implementation in the theory of law: observation, execution, usage and application. Observation is a form of realization of prohibitive legal norms, which consists of passive behavior of subjects, refraining from prohibited acts. Execution – a form of implementation of binding legal norms, which consists of the active behavior of subjects carried out regardless of their own desire. Usage – a form of implementation of authoritative legal rules, which consists of active or passive behavior of subjects, carried out with their own will [15].

The application of the rules of law is a form and method of its implementation. This is the power of the competent state bodies and officials, which is individual and carried out on the legal facts basis and according with the specific legal norms requirements [16, c. 289]. Considering the concept of military discipline as an absence of violation of certain prohibitions, in our opinion, would negatively effect on any sphere of professional activity. For example, it might reduce creative activity and as the result to cause the organizational stagnation.

In order to find the best theoretical and methodological approach that will significantly help in analyzing the disciplinary responsibility for violations of labor discipline, it is recommended to count on authors who use the legal components in their research. It gives another definition for labor discipline, which is defined as the fulfillment by employees of their functions and duties, observance of the established requirements, rules and responsibility for their implementation [17].

The use of the elements of «function» and «responsibilities» allows objectively estimate the essence of labor discipline as a system-forming concept of disciplinary liability institute. At the same time, it is not recommended to the use in the labor discipline definition inter-related by form and content categories. In our opinion, since the legal categories are mentioned, it is advisable to follow the theory of law and use developed approaches to the essence of legal norm as a universal rule of conduct. It is well known that, depending on the behavior within the legal norm, the regulatory norms are divided into obligations, authorizing and prohibiting. So it is proposed to use mentioned above classification in order to define the labor discipline.

Thus, based on the mentioned above, it is possible to state the essence of labor discipline as the fulfillment by employees of his duties, the observance of prohibitions and the use of powers within the legal functions, as well as the system of disciplinary measures for violating these requirements.

The next step is to find out the essence of the disciplinary responsibility. In the legalistic encyclopedia [18], disciplinary responsibility is defined as type of legal responsibility, when employees stand trial for their disciplinary misconduct and go through the disciplinary sanctions provided for by labor legislation.

There are many definitions of disciplinary responsibility in scientific literature, such as: it's a special legal status of disciplinary relations actors, which takes place when disciplinary offense has been committed [19]; it's an application of disciplinary measures for alleged violations of civil service regulations that are not subjected to criminal liability [20] and it is the application of individual moral influential measures such as disciplinary penalties [21].

However, there is a need to consider a wider understanding of legal responsibility, and, accordingly, disciplinary liability as an integral part of it. O. Seagal believes that disciplinary responsibility is the awareness of a person's need to voluntarily and properly perform his duties

and to exercise his rights within the limits of his competence, and in the case of a disciplinary offense, a confession of disciplinary action [22].

This definition corresponds to the essence of a two-dimensional understanding of legal responsibility, which is divided into prospective (positive) and retrospective (negative). Positive legal liability is defined as the proper management of one's area of responsibility in the eyes of the society, state, group of people and individual person [23]. In addition, the positive aspect of legal responsibility involves encouraging behavior that is useful for society and the state; it is so-called morally conscious attitude to performance of obligations.

Retrospective legal responsibility is a specific legal relationship between the state and the offender as a result of state-legal coercion, which is characterized by conviction of the offender with the subsequent punishment in personal, property or organizational manner [24]. Sometimes it is also called a negative (preventive) aspect of legal responsibility, which is defined as a factor ensuring punishment for an offense.

Thus, based on the mentioned above we can define the disciplinary responsibility for violations of labor discipline as a legal relationship in which there is a combination of two models of behavior: a) legitimate, which includes encouraging actions approved by society, state and particular institution; b) unlawful – violation of legal requirements, which determines duties, prohibitions and authority limitations, with the following application of a special administrative measures – disciplinary punishment.

The basis for disciplinary responsibility is an administrative offense – failure to perform or improper performance of official duties. It can also be a disciplinary offense – a violation of the obligations imposed on persons holding a certain position, violation of the established restrictions, and the use of unauthorized authority.

In our opinion, the use of the term «service offense», which is close by content to the category of «disciplinary offenses», is only possible in case of clear distinction between categories of service offenses and criminal and administrative offenses, as well as its delineation from the category of «disciplinary offenses».

The peculiarities of labor relations in the context of the COVID-19 pandemic include the following:

a) legal gaps in the regulation of labor relations in the aspect of ensuring self-isolation of workers who had contact with COVID-19 confirmed patients. As of September 2020, more than 10 thousand employees were in self-isolation, and the amount of compensation for lost earnings from the Social Insurance Fund of Ukraine during this time exceeded 13 million hryvnias [25]. At the same time, the main reason for issuing a temporary disability certificate with an indication of the reason for incapacity for work «isolation from COVID-19» is currently a report by the employee himself or by a third party. Due to the virtual absence of epidemiological investigations, as stipulated by Article 36 of the Law of Ukraine «On Protection of Population against Infectious Diseases» [26], there is a situation of legal uncertainty regarding the false reporting by an employee of information about contact with an infected person;

b) concealment by employees the facts of coronavirus disease (personal or family members). Presence of infected people inside institutions or organizations endanger spread of COVID-19 among other persons. Labor legislation does not directly oblige the employee to inform the employer about the certain diseases. Moreover, Article 39-1 of the Fundamentals of Ukrainian Legislation on Health Care enshrines the right for secrecy about one's health. In fact, the patient has the right for secrecy about his health, the fact of applying for medical assistance, diagnosis process, as well as information concerning medical examination results. It is forbidden for employer to demand from his employee any information about patient diagnosis and treatment [27]. However, such an employee may not only endanger the health of others, in certain cases of infection with the Coronavirus Disease COVID-19 can even cause the death of coworkers belonging to the so-called risk group. So, in our opinion, there is a so-called abuse of the right, when the employee's behavior is permitted by law and poses a threat to the life and health of other employees;

c) legal uncertainty regarding the evasion of workers in the presence of reliable information about the possibility of infection with COVID-19 from medical examination and testing, if the employee performs functions that involve contact with other persons. On the one hand, as already indicated above, this behavior is quite legitimate. On the other hand, it does not allow other persons to implement their rights for safe working conditions, which are enshrined by Part 1 Article 6 of the Fundamentals of Ukrainian Legislation on Health Care;

d) problems in understanding the legality of the refusal from vaccination of those em-

ployees, whose activity involves active social contacts. On the one hand, according to Article 10 of the Fundamentals of Ukrainian Legislation on Healthcare, the preventive medical examinations and vaccinations is not a right, but an obligation of citizens of Ukraine. The Cabinet of Ministers of Ukraine statistic, dated January 10, 2020, informs about 19767 deaths and 1155026 COVID-19 infected in Ukraine [28]. However, 40% of surveyed by the Rating group citizens in November 2020 stated that they would not accept COVID-19 vaccination, even if it is free of charge [29]. Again, compulsory vaccination would be a violation of human rights. However, workers who refuse to be vaccinated pose a threat to the epidemiological well-being, life and health of those of their colleagues who, due to medical contraindications, cannot be vaccinated;

It is beyond argument that ensuring the employee's right for safe and healthy working conditions in the context of the COVID-19 is complex group of actions that must include a number of pedagogical, psychological, economic and medical solutions. However, general direction of such events, in our opinion, should be determined within the limits of legislation. The role of employment and labor law in such conditions is to create legal effect and boundaries for the misconduct of employees, in order to prevent and reduce the risk of any contacts with affected personnel.

Conclusions. For the foregoing reasons, it can be concluded that actions of deliberately placing coworkers at risk of contracting COVID-19 constitutes inappropriate performance of their duties and may result in disciplinary liability. Such a disciplinary offense has signs danger and constitutes a willful violation of established restrictions. At the same time, taking into account the peculiarities of modern labor and medical legislation, bringing such persons to disciplinary responsibility seems to be quite difficult due to gaps in both labor and medical legislation. However, World Health Organization predicts the recurrence of such pandemics [33], that is why appropriate guarantees for safe working conditions for health requires a solution at the legal level.

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Abstract

The article contains an analysis of the essence of labor discipline. The theoretical approaches to its understanding are considered. The article substantiates expediency to use in the concept of labor discipline definition purely legal categories. It is also emphasized on negative attributes and contradictions in the Labor Code of Ukraine and the Disciplinary Statute of the Armed Forces of Ukraine. The article proposes the author's definition of labor discipline.

It is proposed to consider a service offense as the basis for disciplinary liability. At the same time the essence of disciplinary liability is characterized.

The peculiarities of labor relations in the context of the COVID-19 pandemic include the following: a) legal gaps in the regulation of labor relations in the aspect of ensuring self-isolation of workers who had contact with COVID-19 confirmed patients; b) concealment by employees the facts of coronavirus disease (personal or family members); c) legal uncertainty regarding the evasion of workers in the presence of reliable information about the possibility of infection with COVID-19 from medical examination and testing; d) problems in understanding the legality of the refusal from vaccination of those employees, whose activity involves active social contacts.

It has been found that deliberately placing others at risk of contracting COVID-19 while a person is on duty constitutes improper performance of their duties and may lead to disciplinary liability. Such a disciplinary offense carries signs of guilt and danger and constitutes a deliberate violation of established restrictions.

Keyword: *labor legal relations, labor discipline, service discipline, disciplinary responsibility, Disciplinary Statute, COVID-19 pandemic.*