The right to one's own image of workers

The right to one's own image, defined by the ruling of the Constitutional Court (STC), March 26, 2001, “attributes to its holder the right to determine the graphic information generated by their personal physical features, that can be publicly disseminated. The power granted by this right, as a fundamental right, essentially consists of preventing the obtaining, reproduction or publication of one's own image by an unauthorized third party, regardless of the purpose - informative, commercial, scientific, cultural, etc. – persecuted by whoever captures or disseminates it”, is enshrined in art. 18 CE: “The right to honor, personal and family privacy and one's own image are guaranteed.” The specificity of the right to one's own image, in the field of labor law, is found mainly in art. 4.2.e Workers' Statute (ET), when it states that workers have the right "to respect for their privacy and due consideration for their dignity." Similarly, the art. 8.11 of the Law on Infractions and Sanctions in the Social Order (LISOS) classifies as very serious infractions “acts of the employer that are contrary to respect for privacy and due consideration for the dignity of workers.” Similarly, the art. 17.1 ET similarly protects the right to the workers' own image, which, although it does not list in its discriminatory factors the external appearance of the worker, the doctrine considers that the list contained would be based on a numerus apertus that, based on the art. 14 EC, would end up considering unequal treatment based solely on the physical appearance of the worker to be discriminatory.

Likewise, the right to one's own image also prevents the company from using workers for commercial or advertising purposes, unless this has been agreed in the employment contract, or unless it is inherent to the position. In this sense, Ruling of the Constitutional Court num.99/1994, of April 11. A truly illustrative example is found in Sentence number 954/2012 of the TSJ of Madrid, dated November 16, 2012 (Rec. 5519/2012), which announced the case of a worker who came to provide her services for a well-known brand of jeans and that, during the employment relationship, a photograph was taken of him that was later used to sell a line of t-shirts with his photo, without his consent. The Court reminds us that our legal system (ex. art. 18.11 CE in relation to art. 7.6 LO 1/1982) is not alien to this commercial value of the image and, in this sense, not only expressly recognizes that commercial value, but it broadly protects it by establishing that it is considered "illegitimate interference" in the right to one's own image, "the use of the name, voice or image of a person for advertising, commercial or similar purposes." ". Although the right to one's own image, understood as the exclusive right of the interested party to disseminate or publish his or her own image, and, therefore, his or her right to prevent its reproduction (SSTS of April 11, 1987 and February 9, 1989) may be transferred, in certain assumptions, ex. art. 7.5, LO 1/1982, in relation to art. 8.2. The right to one's own image also prevents the company from using workers for commercial or advertising purposes, unless this has been agreed.

Another example is found in one of the best-known rulings in relation to the right to self-image of workers. Specifically, the case concerns a ham pitter who was fired for refusing to cut the Iberian ham, in a sample of the product carried out before the media to present the designation of origin of Extremaduran acorn-fed ham. In this specific case, he considered that the right had been violated, because the strict organizational need for it to be this worker and not another, or in any other way, who complied with the order in the

terms in which it was not evident. It was proposed. Now, when it comes to the company's activity, such as video calls in the case of telemarketing (STS 302/2019 of April 10), a single consent is sufficient when starting the provision of services. Regarding clothing, the company may force the worker to dress in a certain way, as long as the worker's privacy and dignity are respected. Thus, the STS of January 23, 2001 does not consider that the requirement of a long skirt two centimeters above the kneecap and stockings for AVE hostesses violates the right to one's own image, given that the use of a uniform is due to not to a problem of discrimination, but to business organizational considerations, with the aim of giving customers a good image of the company, through adequate uniformity in dress. In this way, the use of work uniforms is legal as long as they do not violate the dignity of the worker and as long as it is not done in a discriminatory manner, that is, forcing the use of two different uniforms, one for men and the other for women. , For example. Thus, women can be allowed, if they wish, to voluntarily wear a skirt, but such clothing cannot be imposed on them, contrary to the male uniform, for example, preventing them from wearing pants (STS of April 19, 2011).

The company may force the worker to dress in a certain way, as long as the worker's privacy and dignity are respected. (Image: File) Regarding the right of trans workers to dress according to the gender with which they identify, it is worth highlighting STC 67/2022, of June 2, 2022. The Constitutional ruling is pioneering for two reasons. To begin with, because it is the first time that the TC has ruled on the right to gender identity or expression. In fact, the magistrates delve into this idea and regret the limited previous jurisprudence on this issue. And second, because it recognizes gender identity as one of the suspected causes of discrimination, and provides it with special protection. However, in the specific case of the ruling, it supports the dismissal of a transgender employee, despite the fact that two company managers forced him to change his clothes when he came to work wearing a skirt, considering that the dismissal had no relationship with the employee's gender expression, since the confrontations with managers occurred in February, while the termination did not occur until May. During that interim, the judges recalled that "there was no reproach related to this issue, despite the fact that he continued to wear a skirt occasionally." In his opinion, if there was a link between both factors, the dismissal and the worker's gender expression, the dismissal "would have occurred immediately, without allowing several months of service provision to pass." Likewise, they admitted that the justification they gave for the dismissal, lack of satisfaction, was a subjective reason, but they indicated that it is something permitted by law, specifically art. 14 of the ET, when the worker is in a trial period. Consequently, the right to one's own image can be limited when it is strictly necessary for business activity, but always in a proportional and appropriate manner.

In this sense, constitutional doctrine has reiterated on multiple occasions that fundamental rights are not absolute, but are subject to limitations in their exercise, “being able to yield to constitutionally relevant interests, provided that the cutback that they must experience is revealed as necessary to achieve the intended legitimate purpose, proportionate to achieve it and, in any case, respectful of the essential content of the right” (TC 57/1994, FJ 6, and TC 143/1994, FJ 6). Thus, for example, a waiter in a high-end restaurant, who may be forced not to wear piercings, but in terms of hair and beard, if it is not very long, it may be more proportional to force him to tie his hair up or trim his head. beard, instead of forcing him to cut his hair or shave his beard completely (STC 170/1987, of October

30, already cited above). Although, not infrequently, and due to traditional conventions, uses and customs, discrimination is carried out. Thus, as an example, it could be the case that a waitress is allowed to wear discreet earrings in a luxury restaurant, while a waiter is forced to take off his earrings, despite being small and discreet, for the sole reason. that the second is a man.