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EMPLOYMENT LAW

From the Playground to the Workplace: Identifying and Removing the Bully

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Special to the Legal

If you thought that bullies only exist on the playground, think again. The individual who was once the grade school bully may have found a similar role at work. The conduct in the workplace, however, may be less obvious than the bully's behavior on the playground.

For instance, the workplace bully may unnecessarily and arbitrarily criticize the victim's work performance to others, intentionally withhold information necessary for the completion of work assignments, establish unreasonable deadlines or deny relevant training to his or her victim. In more blatant cases, the conduct may include screaming, threats of termination or demotion, and public instances of persecution.

With Americans more concerned than ever about job security, it is no surprise that workplace bullying is becoming more common among the American workforce. In fact, a study published by the Workplace Bullying Institute — available at www.workplacebullying.org — estimates that 37 percent of American workers have been bullied at work. An additional 12 percent of the workforce claims to have witnessed workplace bullying, with such conduct being four times more common than illegal harassment. Some experts consider workplace bullying a "silent epidemic."

Workplace bullying appears in all industries and can be difficult to spot. There are also no limitations as to who, within an organization, can engage in bullying behavior. For instance, a workplace bully can be a top-ranking executive or leader, a mid- or low-level manager or a member of the rank and file. The conduct also has no boundaries. For example, bullying can be conducted via the Internet and other electronic media, can be engaged in by groups of employees and can also be caused by someone outside of the workplace, i.e., a customer, vendor or third party. Regardless of who is participating in the conduct or how it is being communicated, the presence of a bully at work can be toxic to any environment.



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The conduct associated with workplace bullying often falls short of harassment or discrimination, and is not necessarily targeted at any one person because of their membership in a protected class. Instead, bullying behavior includes the persistent mistreatment of one's co-workers and subordinates by engaging in obvious and non-obvious conduct. This may include repeated instances of: verbal abuse, sabotage, threatening and intimidating behavior such as glaring, sneering, yelling, name-calling, spreading rumors, public humiliation, unreasonable criticism, unrealistic demands, engaging in ostracism, spying, stalking and other forms of unfair treatment.

Although bullies are not limited to one gender or the other, most bullies tend to be male workers who target women. Female bullies generally target female victims. Notwithstanding the gender of the bully, there are several types of common workplace bullies.

For example, there is the "chronic bully," who is a bully by nature and simply does not see any other way to exist. Contrast that with the "opportunistic bully," who is the competitive, overly ambitious worker whose personal desire for career advancement far exceeds the feelings of his or her colleagues. Finally, some workplaces employ the "accidental bully," who engages in bullying behavior due to social ineptness.

Regardless of the category at issue, most bullying involves the misuse of power. Bullies are motivated to engage in misconduct for a number of reasons. Specifically, the conduct may be a form of retaliation against a worker who engages in whistleblower activities, rebuffs sexual advances, refuses to participate in workplace gossip, fails to conform to specific expectations, participates in union organizing activities, or quite frankly, for no reason at all. (See the August 2008 *Ceridian Connection* .)

Although victims of workplace bullying have tried to assert their rights in court, the battle is often difficult when the bullying falls short of a hostile work environment or discrimination under state or federal anti-discrimination statutes. Accordingly, plaintiffs typically pursue claims for intentional or negligent infliction of emotional distress, which is a difficult standard to meet in the employment context.

For example, in the 2000 case *Fugarino v. University Services* , the U.S. District Court for the Eastern District of Pennsylvania dismissed plaintiff's intentional infliction of emotional distress claim, which was based on the classic workplace bully scenario. In that case, the plaintiff alleged that her boss repeatedly publicly reprimanded her, criticized her, disparaged her personally and professionally, searched her desk, asked her on dates, and made an obscene phone call to her while at work. Citing the conduct as "boorish," the court dismissed the claim, emphasizing that the behavior did not rise to the level of "outrageousness or atrocity" necessary to state an intentional infliction of emotional distress claim.

An opposite conclusion was reached in 1996 in *Subbe-Hirt v. Baccigalupi* . In this instance, the 3rd U.S. Circuit Court of Appeals recognized that Robert Baccigalupi's intentional course of conduct to intimidate, control and demean certain employees — which he allegedly referred to as a "root canal" — was sufficiently outrageous to survive a challenge to an intentional infliction of emotional distress claim at the summary judgment stage. The alleged bullying behavior included grilling the employee in front of clients, picking apart her work, calling her names, conducting excessively long and frequent performance reviews, using sexist metaphors to refer to her, drafting resignation notices and stating that if the employee did not sign, she should take disability, and telling others he planned to "get her."

More recently, in the 2008 case *Raess v. Doescher* , the Indiana Supreme Court expressly recognized "workplace bullying" as a term of art and acknowledged that it could be the basis of a claim for intentional infliction of emotional distress arising out of a supervisor's workplace misconduct. In that case, a hospital room perfusionist pursued intentional infliction of emotional distress, tortious interference with employment and assault claims against a cardiovascular surgeon who allegedly approached plaintiff screaming and cursing with "clenched fists, piercing eyes, a beet-red face, and popping veins" prior to telling him he "was finished." The surgeon was purported to have a history of aggressive work behavior

toward others. The plaintiff did not return to work, in part, because he developed a panic disorder and depression as a result of the incident, limiting his ability to focus and perform well under pressure in an operating room. A jury awarded the plaintiff \$325,000, which was affirmed on appeal.

While the judiciary is reluctant to recognize an independent cause of action for bullying, legislators are not. At the time this article was written, about 16 states had introduced legislation prohibiting workplace bullying. For example, currently pending in New York is Bill 1823B which was recently passed by the Senate.

This piece of legislation, if passed, would establish a cause of action for workers who suffer psychological, physical or economic harm through deliberate and repeated abusive conduct that is not remedied by the employer once on notice of the issue.

Prohibited conduct includes sabotage, repeated verbal abuse or undermining one's work performance. Remedies for violating the bill include injunctive relief, back pay, damages for emotional distress, punitive damages and attorney fees. Similar legislation, titled the Healthy Workplace Act, was reintroduced in New Jersey this year. To date, however, none of the legislative efforts have been successful in creating a cause of action for workplace bullying.

Even though very few of those bullied at work actually pursue litigation, companies should take measures to ensure that bullying is not an accepted part of the work culture. Aside from the goal of maintaining a productive and safe work environment for its workers, employers should eradicate bullying from their workplaces for many reasons.

First, the financial cost of maintaining a bully can be significant because when productivity declines, profits are affected. The victim may spend more time worrying about how to avoid the bully than on their work, resulting in negative performance and quality issues. There are also costs associated with finding replacements for the victims who may have excessive unplanned absences. Additionally, the cost of retraining workers when the victims resign is costly and time-consuming.

Second, tolerating such conduct is incredibly detrimental for employee morale. Those who witness workplace bullying may feel intimidated, threatened and generally unhappy at work. This can result in difficulties attracting and retaining talented employees and may damage the company's public image. Keeping around a bully also implies that the conduct is acceptable to management. Third, the presence of such conduct at work could present safety risks, depending upon the nature and severity of the conduct involved. In certain situations, the conduct could escalate to workplace violence.

Thus, it pays to eradicate abusive conduct and prevent your company from being infected by a workplace bully. Set forth below are some steps that employers could take to minimize the risks associated with workplace bullying:

- Develop a policy that strictly prohibits all forms of verbal, psychological and physical abuse in the workplace, including threatening behavior. The policy should also prohibit retaliation against individuals who complain about bullying or who participate in investigations of such complaints.
- Provide employees with a well-defined complaint procedure so that employees are comfortable reporting incidents involving workplace bullying. The policy should include a statement that reminds employees that in appropriate circumstances, the police should be called.
- Immediate action should be taken to discontinue the presence of bullying behavior. Employees who engage in workplace bullying should be subjected to appropriate discipline, up to and including termination. This may be simpler than it sounds, however. If the worker involved is of a violent

temperament, measures should be taken to remove him or her from the workplace safely and in a manner that does not escalate into violence. Therefore, careful planning is essential.

- Ensure that human resources personnel are included in any resolution of a complaint of workplace bullying. It may be necessary for a human resources representative familiar with the claims to follow up with those involved to confirm that the conduct at issue has stopped.
- Training should be provided to the entire workforce, including leadership. For example, management should be able to recognize workplace bullying, understand the risks it presents to the company and to the workers, and take prompt action to eliminate the conduct from the workplace. Non-managerial employees should also be trained to recognize bullying behavior and be reminded of the company's reporting procedures and policies against engaging in such conduct.
- Confirm whether employee assistance programs offered by your company include programs or support for workplace bullying issues, and offer this information to all employees.
- Conduct thorough exit interviews. Oftentimes, employees communicate important information about the workplace during these informal meetings.

Regardless of whether anti-bullying legislation is ultimately enacted, employers should remember that no one liked to be around the bully on the playground. Likewise, no one wants to work with, or for, a bully. •