

WORKPLACE BULLYING: WILL YOU KNOW IT WHEN YOU SEE IT?

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The media and political figures have paid increased attention to workplace bullying in recent months and years. A simple Google search can confirm this reality. Moreover, legislators in 21 states have introduced bills to address and combat workplace bullying, starting with California in 2003.

Interestingly, none of the legislatures into which these bills have been introduced have passed the bills into law. There are a variety of explanations for the fact that there has not been a change in the law despite workplace bullying becoming a hot button employment issue, but the most obvious explanation is this: it is difficult to define workplace bullying.

WHAT IS IT, EXACTLY?

The general definition of workplace bullying is a behavior in which an individual or group uses persistent, aggressive, or unreasonable behavior against a coworker or subordinate. As with childhood bullying, we often think of workplace bullying as being marked by physical acts, such as assaulting a coworker or at least invading that coworker's personal space in a threatening manner.

But the phenomenon often takes on subtler forms. For instance, a supervisor can act as a bully by manipulating work tasks, like giving a victim repetitive or irrelevant assignments as a means of control. Supervisors can also act as bullies in the way that they provide feedback. For instance, a supervising bully can choose to belittle an underling in a public setting so as to humiliate the

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subordinate, as opposed to delivering constructive criticism in a private setting.

Because bullying comes in many different forms and is often understated, it is a challenge to create a proper legal definition for it. Most notably, it is difficult to draw precise lines between assertive managers and bullying conduct. Employers depend on their managers to evaluate the performance of the employees under their supervision and to provide feedback so those employees can learn from mistakes and improve. How do we know when that vital evaluation process has crossed the border and become bullying behavior, especially when criticism by its nature entails negative statements?

The trouble with creating a legal definition of workplace bullying – one that judges and juries will have to use when deciding whether a manager has committed an illegal act – calls to mind Supreme Court Justice Potter Stewart’s famous definition of obscenity: “I know it when I see it.”

However, the second part of Justice Stewart’s quote illustrates the truism that sometimes we all have to engage in subjective exercises. Here is the quote in full:

I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [“hard-core pornography”]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.

Despite the inherent difficulty involved with defining a nebulous concept, Justice Stewart *did make a judgment* on the film at issue. He had to make a tough call. Likewise, employers are best served to do their best in reaching decisions on whether certain behavior constitutes bullying. Two simple rules of thumb can aid in analyzing these situations, especially with respect to supervisor/supervisee relations:

1. Does the supervisor's behavior go beyond our company's norms for providing feedback?
2. If the answer to the first question is yes, is this a persistent problem or simply one instance of poor judgment on the part of a supervisor?

PROBLEMS ARE BOTH LEGAL AND PRACTICAL

State legislatures might struggle to define workplace bullying, but the absence of specific anti-bullying laws should not deter employers from being wary to this phenomenon. If left unchecked, bullying can create a host of workplace headaches, such as: 1) increased use of sick leave; 2) increased use of medication, such as anti-depressants, sleeping pills, and tranquilizers; 3) social withdrawal; 4) decreased productivity and motivation; 5) increases in the frequency and severity of behavior problems; 6) erratic behavior, such as frequent crying spells and increased sensitivity; and 7) increased turnover.

And the fact that there is no designated tort for workplace bullying does not mean that the behavior cannot create lawsuits in other ways. Assault and battery claims are the most obvious legal actions that bullying can engender, but there are a host of other ways that employees who are bullied (or who perceive that they were bullied) can gain access to the courts.

For instance, a bullying victim can bring a claim pursuant to Title VII for harassment or discrimination if the individual has a way to tie the activity to a protected characteristic, such as "my female boss degrades the men under her supervision." A bullying victim can also bring a claim against an employer for negligent hiring and retention on the theory that the employer knew about a supervisor's bullying tendencies – either during the hiring process or thereafter – and did nothing. There are even implications under OSHA, which requires that employers complete a Workplace Violence Incident Report in any instance in which an employee commits a violent act against another employee.

OUR ADVICE

In light of the performance- and litigation-related reasons to combat workplace bullying, you should take steps now to handle this problem, if you have not already done so. Every

employer should have an anti-bullying policy that: 1) defines workplace violence and bullying behaviors; 2) provides a reporting procedure that identifies multiple managers to whom incidents or threats can be reported; and 3) encourages employees to report incidents, especially by assuring them that the employer will not tolerate retaliation against an individual who complains of bullying.

That last point is especially important because bullying victims often feel powerless as a result of the power dynamic that the bully has fostered. You should also train your managers on workplace bullying so they have a basic understanding of the warning signs and the potential impacts for not addressing bullying at the first possible instance.

While the law has not caught up to the problem of workplace bullying – and it might never do so because of the inherent definitional problems – a savvy employer can get in front of the issue by taking basic steps to ensure a bully-free workplace.

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