



# The Ongoing Struggle to Implement Workplace Anti-Bullying Policies

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Workplace and school violence events have contributed to our increasing national conversation about “bullying.”

Recently, NPR quoted a Zogby poll in which more than a quarter of American workers reported that they have experienced abusive conduct at work.

- Some 64 percent of respondents to a Monster Global Poll felt that they had been “bullied, either physically hurt, driven to tears, or had their work performance harmed.”
- Legislation is pending in a number of states and the topic regularly shows up in several media discussions.
- Hard to legislate against “being a jerk”

We would be interested in how many of you are actually implementing workplace anti-bullying policies, whether they are separate from your no-discrimination/no harassment efforts, and whether you are seeing a positive effect?

Both practical and legal problems impede developing effective policies. As an example, how do you define “bullying” and how do you distinguish this objectionable conduct from the sort of workplace banter and teasing that men often use to bond with one another?

Michael Aitken, Vice President of Government Affairs for the Society of Human Resource Management, pointed out that, “It’s tough, if not impossible, to legislate against someone being a jerk.” However, employers may be able to develop an effective Code of Conduct and Effective Anti-Bullying Policy based upon requiring employees to use “good judgment” and to be a “professional.”

## **NLRB decisions make it harder to draft policies**

There are new challenges to employer policies every time the National Labor Relations Board opens its doors. The NLRB has (incredibly) broadly attacked Rules of Conduct as “tending to chill employees in the exercise of their Section VII rights.” Although the U.S. Court of Appeals for the D.C. Circuit and the Board itself have observed “that threatening and abusive language are not inherent aspects of union organizing or other Section VII activities,” the NLRB nonetheless strikes down many policies as too vague.

Any policy has to be read as a whole, and a single statement may be lawful or unlawful depending upon the purpose of and the context of the policy. Thus, some of the language set out below has been found lawful in certain context or in conjunction with other policies. Nevertheless, the NLRB has found the rules below as overbroad in recent cases:

- A rule prohibiting “making false, vicious, profane or malicious statements toward or concerning the hotel or any employee;”
- Verbal comments or physical gestures directed to others that exceed the bounds of fair criticism and behavior that is counter to promoting teamwork;
- Behavior that is disruptive to maintaining a safe and healing environment or that is counter to promoting teamwork;
- Prohibiting “loud, abusive, or foul language;”
- Discipline for “the inability or unwillingness to work harmoniously with other employees;”
- Prohibiting negativity, any type of negative energy or attitudes;
- Engage in any activity which could harm the image or reputation of the company; and,
- A rule prohibiting “negative conversations” about employees or managers.

### **Defining “abusive conduct”**

The decisions are not consistent and it is difficult to find clear patterns. One response may be to utilize the language in some of the proposed state anti-bullying statutes. One proposed statute defines “abusive conduct,” as:

*Acts, omissions, or both, that a reasonable person would find abusive, based on the severity, nature and frequency of the conduct, including, but is not limited to: repeated verbal abuse such as the use of derogatory remarks, insults, and epithets; verbal, non-verbal, or physical conduct of a threatening, intimidating, or humiliating nature; or the sabotage or undermining of an employee’s work performance. It shall be considered an aggregating factor if the conduct exploited an employee’s known psychological or physical illness or disability. A single act normally shall not constitute abusive conduct, but an especially severe and egregious act may meet this standard;*

Abusive work environment” means, an employee condition when an employer or one or more of its employees, acting with intent to cause pain or distress to an employee, subjects the employee to abusive conduct that causes physical harm, psychological harm, or both.”

### **Time to review your handbooks– again**

I would be interested in comments on how readers are addressing bullying in the workplace.

I also encourage you to obtain legal review of your employee handbooks and policies, even if you did so in 2013.

Yes, the NLRB has changed things that much. But more on that subject in a future post.  
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