



DON'T GET **PUSHED** AROUND

An employee in your company approaches you and tells you he is terrified to come to work. He explains that he is constantly the subject of social ostracism, vulgar language and dismissive and rude behavior from both supervisors and coworkers. Despite producing quality work, he is criticized on a regular basis for his performance. He does not believe, however, that this treatment is because of race, gender, age or any other protected characteristic. Is this employee simply disgruntled, or just too sensitive and unable to handle the rigorous nature of today's corporate climate? As we all know, times are tough and competition among coworkers and supervisors in corporate America

What Employers Should Do to Address Bullying Behavior in the Workplace

is not uncommon. Some companies may even encourage such behavior by overemphasizing that competitiveness. However, the behavior that your employee describes may be more than workplace competition, and failing to deal with the issue promptly may have a negative impact on your company — both legally and financially.

What is Workplace Bullying?

An emerging risk for companies today is a surprisingly common phenomenon known as workplace bullying. While there is no standard definition of workplace bullying, the expression is commonly used to describe workplace behavior that could reasonably be considered threatening, demeaning, humiliating or intimidating to an individual or group, thus creating an “abusive work environment.” Unlike unlawful harassment, which is generally based on race, color, sex, religion, national origin, disability and/or age, workplace bullying is an act that involves the psychological — and sometimes physical — abuse of one person by another. This behavior is normally directed at employees or their job performance, but is not based on any protected status. Additionally, because workplace bullying behavior is usually covert, it is difficult to detect.

The Workplace Bullying Institute (WBI) is a leading organization formed to help eradicate workplace bullying through research in North America. In addition to the WBI’s research component, it has separate legislative and educational divisions that allow for focus on public policy solutions to workplace bullying and professional training, respectively. According to research conducted by the WBI, some of the most common workplace bullying tactics include:

- Falsely accusing an individual of “errors” not actually made;
- Nonverbal intimidation, such as staring and glaring, that clearly shows hostility;
- Discounting individuals’ thoughts or feelings in front of others (i.e., in meetings);
- Using the “silent treatment” to ignore the individual;
- Exhibiting uncontrollable mood swings;
- Randomly making up their own rules and not following them;
- Disregarding individuals’ satisfactory or exemplary quality of completed work;
- Constantly criticizing an individual, using a more harsh standard than for others;
- Starting or failing to stop destructive rumors or gossip about an individual; or
- Encouraging others to turn against the individual.

Although workplace bullying is not illegal per se, it is on the rise, and has a strong possibility of becoming illegal when looked at in the employment law context. Furthermore, this form of behavior can have a profound effect on



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employee morale and performance, and your company’s culture.

Workplace Bullying and Its Impact on the Workplace

Workplace bullying is becoming more of a potential liability issue for employers due to the massive research and media exposure it has received in recent years. In 2007, the WBI partnered with Zogby International, a polling and market research company, to conduct the first representative study of adult Americans on the topic of workplace bullying. According to their research, 37 percent of the US workforce, or roughly 54 million employees, admitted that they had at some point experienced bullying on the job. The research also revealed that:

- Most bullies are bosses (72 percent);
- More perpetrators are men (60 percent) than are women (40 percent);
- Most individuals bullied (57 percent) are women;
- Female bullies target women (71percent); men target men (54 percent);
- Bullying is four times more prevalent than illegal discriminatory harassment;
- 62 percent of employers ignore the problem;
- 45 percent of those targeted suffer stress-related health problems;
- 40 percent of those bullied never tell employers; and
- Only 3 percent of bullied people file lawsuits.

Workplace bullying is becoming so prevalent that the 2008 International Conference on Occupational Stress and Health, titled “Work, Stress, and Health 2008: Healthy and Safe Work Through Research, Practice and Partnerships,” featured many papers on this topic that received international press coverage. Furthermore, over the past few years, the National Institute for Occupational Safety and Health has been involved in research and studies focused on workplace bullying to assist with their research in identifying factors associated with work-related stress.

Most recently, *Consulting Psychology Journal*, a prominent academic journal published by the American Psychological Association, devoted its entire September 2009 issue to identifying solutions to workplace bullying, including effective organizational consultation, policies and legislation; alternative dispute resolution and specialized training. Additionally, workplace bullying has been discussed on various talk radio shows and in hundreds of news articles and workplace blogs.

Financial Costs for Employers

Workplace bullying can have a significant impact on an employer's bottom line. A recent survey of 9,000 federal employees indicated that 42 percent of female and 15 percent of male employees reported being bullied within a two year period, resulting in a cost of more than \$180 million in lost time and productivity. High absenteeism and turnover rates are common with workplace bullying and this increases employers' costs in having to hire and re-train employees.

In addition to the economic drain resulting from high absenteeism and high turnover of individuals who are victims of bullying, health care costs may also increase. According to a study conducted by the WBI in 2003, many bully targets become depressed. The research found that targeted individuals suffer debilitating anxiety, panic attacks, clinical depression (39 percent) and even post-traumatic stress (30 percent of women; 21 percent of men).

Current State of the Law

With the level of workplace bullying activity on the rise, there have been a few instances where the issue has been raised in court. For example, in *Raess v. Doescher*, the Indiana Supreme Court upheld a \$325,000 verdict against a cardiovascular surgeon accused of being a "workplace bully." No. 49S02-0710-CV-424, Indiana Supreme Court (April 8, 2008). In this case, the plaintiff Joseph Doescher was a hospital operating room perfusionist who worked with a cardiovascular surgeon, Dr. Daniel Raess. Doescher alleged that Raess aggressively charged him "with clenched fists, piercing eyes, beet-red face, popping veins, and screaming and swearing at him." Doescher testified that he backed up against the wall and put his hands up, fearing that Raess was going to hit him. Although Doescher's legal claims were intentional infliction of emotional distress and assault, the trial strategy was to present Raess as a classic workplace bully. The jury found for the doctor on the intentional infliction of emotional distress claim, but for

Doescher on the assault claim and awarded him \$325,000.

On appeal, the Indiana Court of Appeals reversed and remanded the case because the trial judge allowed the testimony of a "workplace bullying expert," Dr. Gary Namie, one of the co-founders of the WBI. Dr. Namie testified as to the nature of Raess' behavior saying that in his opinion, it was "an episode of workplace bullying...." He said he reached his conclusion based on what he heard and read and that Raess "is a workplace abuser, a person who subjected [Doescher] to an abusive work environment." In addition, the court of appeals found that the trial court failed to give a jury instruction requested by Raess that workplace bullying was not an issue in the case and that there was no basis in the law for such a claim.

The Indiana Supreme Court reversed the court of appeals, reinstating the trial court's award to Doescher. It found no error in the trial court's ruling that allowed Dr. Namie's expert testimony. According to the court, the term "workplace bullying" could be used because the phrase is "like other general terms used to characterize a person's behavior...." The court boldly stated that "[a]s evidenced by the trial court's questions to counsel during pre-trial proceedings, workplace bullying could 'be considered a form of intentional infliction of emotional distress.'" Importantly, the court also found that the trial court did not err in refusing to instruct the jury that workplace bullying is not illegal.

Notwithstanding the *Doescher* case, which essentially permits an expert witness to opine on workplace bullying, without a workplace bullying law in place, it is usually quite difficult for alleged victims to sue for this behavior. These individuals generally only have the option of suing for this behavior under the theories of:

- intentional infliction of emotional distress, which would require some sort of extreme/outrageous behavior;
- assault, which could include physical touching or the apprehension thereof; or
- illegal discrimination, in which the behavior would have to be based on some protected status, such as the individual's race, gender, national origin, sex or disability.

In addition, depending on whether the individual victim's employment has been terminated, it may be possible to make out a wrongful discharge claim under state law if he or she can show a specific public policy has been violated. The elements of these theories are not easily satisfied by workplace bullying because, as mentioned above, this behavior tends to be covert. However, employers should be prepared to deal with these allegations and be proactive in avoiding the behavior all together.

Legislation

While there is currently no law in the United States that explicitly addresses the issue of workplace bullying,

Costs of Bullying to Your Business:

- High Staff Turnover
- Retraining Costs
- Damage to Employee Health
- Absenteeism and Sick Leave
- Workplace Violence
- Wrongful Termination Suits
- Lowered Productivity
- Impact on Bottom Line

since 2003, 13 state legislatures have considered the issue. However, to date, none of the proposed legislation has been enacted. The language of most of the bills allow for employees to sue their employers for creating an “abusive work environment” based on the theory that these laws are essential to protect public health. The text of New York’s proposed bullying law demonstrates this point well. The law would establish a private cause of action for an abusive work environment. Section 760 states that:

The legislature hereby finds that the social and economic well-being of the state is dependent upon

Useful Resources

1. The Workplace Bullying & Trauma Institute, *The 2007 WBI-Zogby Survey*, www.workplacebullying.org/research.html.
2. Farrell, Liz Urbanski, “Workplace bullying’s high cost: \$180M in lost time, productivity;” *Orlando Business Journal* - March 15, 2002.
3. *Raess v. Doescher*, No. 49S02-0710-CV-424, Indiana Supreme Court (April 8, 2008).
4. Lowman, Rodney, ed., *Consulting Psychology Journal: Practice and Research*, 2009 Volume 61, Issue 3 (September).
5. Namie, Gary and Ruth, The Workplace Bullying & Trauma Institute, *2003 Report on Abusive Workplaces*; October, 2003.
6. Workplace Bullying Legislative Campaign www.workplacebullyinglaw.org/.
7. Bullying in the news: media queries, www.workplacebullying.org/press.
8. Mattice, Catherine, MA & Spitzberg, Brian, Ph.D. “Bullies in Business: Self-Reports of Tactics and Motives,” San Diego State University, 2007.
9. *Bullying in the Workplace*, JED New Media, Inc., (online training), www.training-classes.com/programs/00/01/164_bullying_in_the_workplace.php#course_detail.
10. *Confronting Workplace Bullying*, Society for Human Resource Management, training program (members only), www.shrm.org/templatestools/samples/powerpoints/pages/confrontingworkplacebullying.aspx.
11. WBI University, Training through Workplace Bullying Institute, www.workplacebullying.org/wbiuniversity.html.
12. *Most Workplace Bullying is Worker to Worker, Early Findings From NIOSH Study Suggest*, The National Institute for Occupational Safety and Health, www.cdc.gov/niosh/updates/upd-07-28-04.html.

healthy and productive employees. Surveys and studies have documented that between 16 and 21 percent of employees directly experience health- endangering workplace bullying, abuse and harassment. Such behavior is four times more prevalent than sexual harassment. These surveys and studies have further found that abusive work environments can have serious effects on the targeted employees, including feelings of shame and humiliation, stress, loss of sleep, severe anxiety, depression, post traumatic stress disorder, reduced immunity to infection, stress-related gastrointestinal disorders, hypertension and patho- physiologic changes that increase the risk of cardio- vascular diseases. Furthermore, the legislature finds that abusive work environments can have serious consequences for employers, including reduced em- ployee productivity and morale, higher turnover and absenteeism rates, and significant increases in medi- cal and workers’ compensation claims.

The legislature hereby finds that unless mistreated employees have been subjected to abusive treatment in the workplace on the basis of race, color, sex, national origin or age, such employees are unlikely to have legal recourse to redress such treatment.

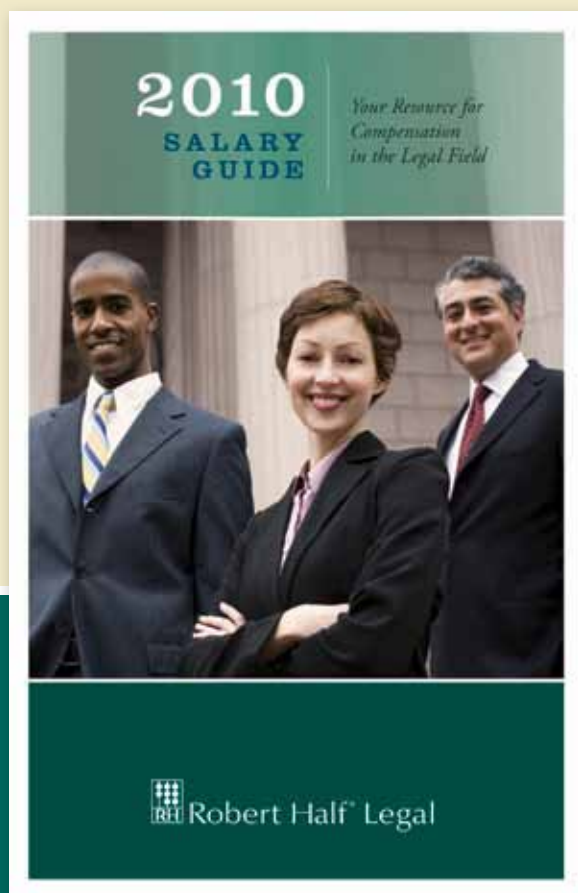
The legislature hereby declares that legal pro- tection from abusive work environments should not be limited to behavior grounded in a protected class status as required by employment discrimina- tion statutes. Existing workers’ compensation pro- visions and common law tort laws are inadequate to discourage such abusive conduct and provide adequate redress to employees who have been harmed by abusive work environments.

The purpose of this article shall be to provide legal redress for employees who have been harmed psychologically, physically or economically by be- ing deliberately subjected to abusive work envi- ronments; and to provide legal incentives for em- ployers to prevent and respond to mistreatment of employees at work.

Section 761 of the proposed law defines the abusive [workplace bullying] conduct as the following:

1. “Abusive conduct” means conduct, with mal- ice, taken against an employee by an employer or another employee in the workplace, that a reason- able person would find to be hostile, offensive and unrelated to the employer’s legitimate business in- terests. In considering whether such conduct is oc- curring, the trier of fact should weigh the severity, nature and frequency of the conduct. Abusive con- duct shall include, but not be limited to, repeated infliction of verbal abuse, such as the use of de- rogatory remarks, insults and other epithets; verbal

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or physical conduct that a reasonable person would find threatening, intimidating or humiliating; or the gratuitous sabotage or undermining of an employee's work performance. A single act should not constitute abusive conduct, unless the trier of fact finds such act to be especially severe or egregious.

3. "Conduct" means all forms of behavior, including acts and omissions to act.

Additionally, if an employer were found civilly liable for the existence of an abusive work environment under its control, there would be penalties under Section 760 to include injunctive relief such as reinstatement and lost wages, emotional distress damages, punitive damages and attorneys' fees.

Proposed laws like New York's will continue to be introduced in increasingly more states and employers ought to remain alert to the passage of such legislation in states where they do business.

What Employers Can Do Now

Even though it may be challenging for employees to hold employers liable for workplace bullying under current legislative and litigation theories, it is clear that workplace bullying is an emerging risk area and can have serious negative effects in the workplace. To mitigate these risks, employers should consider taking the following proactive measures to reduce and respond to bullying behavior in the workplace.

First, employers should consider establishing a policy that prohibits workplace bullying either by creating a new policy, or by expanding the employer's current harassment policy. In implementing such a policy, employers should consider whether they want to maintain a strict zero tolerance anti-bullying policy, or establish a policy that provides for more flexibility in dealing with individual employment situations.

Companies need to keep in mind, though, that implementing a policy may confer legal rights to employees in certain jurisdictions and thus increase the company's liability if enforced. Accordingly, companies should assess their individual businesses and location (i.e., whether their states have held provisions in employee handbooks to be contractually enforceable) and then weigh the costs and benefits of including an anti-workplace bullying pro-

vision in their employee handbooks. While the inclusion of a zero tolerance anti-workplace bullying provision may not work for every company, including at least some reference to a prohibition of such behavior may nevertheless improve the work environment.

In drafting an effective workplace bullying policy for your company, there are some important areas to cover in order to avoid any potential ambiguity. First, the directive should be clear. Notify both employees and supervisors that workplace bullying is not acceptable behavior in your workplace. You should then define the problem of workplace bullying and spell out the consequences that this conduct can have on your company (i.e., lower productivity, higher turnover). Also, state the reasons for adopting your workplace bullying policy, emphasizing that you take such matters seriously, and clarify the proper procedures for reporting incidents so employees will be aware of their options if they do have a concern. (Given that companies should already have harassment policies, reporting procedures could easily follow those already established.) Finally, be sure to include the consequences for the bullies. Having established penalties for these individuals could be a deterrent for the behavior and avoid allegations of unfair discipline. As with every employee policy, to encourage compliance, there should be some documentation (whether electronic or written) to demonstrate that all employees received and understood the workplace bullying policy.

In addition to a written policy, employers have the option to build company-wide awareness of workplace bullying with training sessions and workshops, focusing on the development of healthy and productive communication skills. This type of training can be incorporated into a company's overall manager and EEO training program. There are many workplace bullying training tools available (see Useful Resources, *infra*) that seek to teach employers to recognize the symptoms of classic bullying behavior in the workplace, become proactive, and gain tips on how to develop a plan to spot and stop bullying patterns effectively. Much of this training information is available on the internet and can be purchased at a reasonable cost. Employers may also implement workplace bullying training videos and workshops for employees, similar to those available for illegal harassment and discrimination training, so that employees can see demonstrated examples of impermissible behavior in the workplace. As part of a company's training and communication efforts, it should be clear that there is commitment from the C Suite that bullying will not be tolerated.

It is a good idea for employers to watch for signs of workplace bullying in its workforce. An employer can do this by regularly reviewing turnover rates, absenteeism, short-term disability leave patterns, changes in performance, early retirement or transfer requests. If an

Create a Policy for Your Company


1. Take a Stand Against Workplace Bullying
2. Define the Problem
3. Spell Out the Impact on Your Organization
4. Provide Reporting Procedures
5. State the Consequences for Bullies

employer notices, for example, that there is a pattern of high turnover, including the turnover of high-performing employees, within a particular department, the employer should consider workplace bullying as a possible issue. To avoid missing out on potentially useful information relating to workplace bullying, employers should conduct meaningful exit interviews with each individual who leaves the company to identify any problems and patterns. Employers should also consider conducting periodic surveys of current employees to assess whether any destructive behavior is impacting morale or creating other problems.

Also beneficial to employers is an evaluation of their performance review processes to ensure that employees are being held accountable for how they behave in the workplace. Employees should be assessed not only on the results they achieve, but how they achieve those results. An employee who achieves results through intimidation and scorched earth tactics should not be rewarded. Employers should make their expectations for performance clear to all employees so they understand how their performance will be measured and that bullying behavior can have a direct impact on their performance review.

Finally, employers can help avoid a workplace bullying incident from going too far once it has started by taking all allegations seriously and thoroughly investigating each complaint. Just like with protected class harassment and

discrimination, employers should seek to intervene and rectify workplace bullying issues as soon as they are made aware of the situation. Employers should provide for alternative dispute resolution in instances of workplace bullying to attempt resolution of these complaints within the workplace. It is beneficial for employers to implement this form of conciliation in order to avoid a bully victim from suing immediately and exposing the employer to liability (assuming some cause of action exists). If inappropriate bullying is discovered, the employer should take sufficient disciplinary action to stop the offending conduct, and follow up with the accuser to ensure that the bullying has ended. In documenting the investigation, it is important to make it clear that while the conduct at issue violates company policy, it does not involve conduct based on any protected classification. This can help if the victim later makes a claim for illegal discrimination.

As noted above, workplace bullying can impact a company both legally and financially. By implementing some or all of the practices suggested here, employers can demonstrate their commitment as to what will and will not be tolerated in the workplace. Hopefully this will mitigate risks to the employer, as well as reduce the negative impacts associated with bullying behavior in the workplace. 

Have a comment on this article? Email editorinchief@acc.com.

ACC Extras on... Workplace Behavior

ACC Docket

- *Corrective Coaching: A Tool for Managing At-Risk Executive Behavior (November 2009)*. People in positions of power generally have the intelligence and experience to lead their companies to the next level of success. However, these qualities do not guarantee that they are warm, fuzzy people who treat their staffs with respect. When execs are behaving badly, corrective coaching can help. www.acc.com/docket/cor/coach_nov09

Education

- *Employment Law Update (October 2008)*. Employment law is a never-ending, ever-changing source of concern to in-house counsel. This session addressed what has happened over the past year in the courts, with the regulators, and in the legislative arena. www.acc.com/emplaw/update_oct8

Sample Forms and Policies

- *Equal Employment Opportunity Policy and Policy Prohibiting Sexual and Other Workplace Harassment (March 2006)*. These samples for an equal employment opportunity policy and a policy prohibiting sexual and other workplace harassment include sections for investigating and resolv-

ing discrimination and harassment matters, among many others. www.acc.com/eeopolicy_mar06

- *Workplace Behavior Policy (March 2005)*. A workplace behavior policy that sets forth guidelines regarding certain interpersonal conduct that is inappropriate and unacceptable. www.acc.com/forms/wkpl/policy_mar05
- *Respect for Co-Workers and Others: Policy Against Discrimination and Harassment (March 2005)*. A policy that emphasizes to employees that certain interpersonal conduct is inappropriate and unacceptable. www.acc.com/forms/discr&hrs/pol_mar05

Webcast Transcript

- *Handling Harassment Complaints and Managing the New Retaliation Standards: Tips on Avoiding Employment Lawsuits (July 2007)*. This transcript provides guidance on reducing litigation risk for harassment claims and avoiding the retaliation trap. www.acc.com/webtrans_empl/suits_jul07

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