Bullying in the Workplace: Not Every Wrong Has a Legal Remedy

By Martha Weisel

Part I

Read the newspaper, listen to the radio, talk to friends — instances of bullying abound. Stories highlight bullying among children in the lunchroom and on the playground,1 cyber bullying by adolescents through social media,2 even bullying by senior citizens in adult communities.3 It comes as no surprise that bullying is part of the business landscape. However, what does come as a surprise is that there are few, if any, legal remedies for workplace bullying. This paper examines the various options that are being used or considered to combat workplace bullying. Part I examines current legal remedies, beginning with Title VII of the Civil Rights Act of 1964. Although the federal statute provides a remedy for a hostile work environment, the courts have determined that if an employee is not a member of a protected category (e.g.: race or gender) he/she is not protected. Further, even if a member of a protected class, the plaintiff must establish that the harassment was based on race or gender. Common law remedies are examined next. Many cases of workplace bullying are brought to court as intentional torts, such as assault or intentional infliction of emotional distress. In such instances, the plaintiffs must prove that the defendant’s actions caused plaintiff actual physical or psychological harm – as well as establishing that defendant’s conduct was purposeful. Workers’ compensation has also been used by plaintiffs seeking compensation for workplace bullying.

In light of the limitations in the current litigation model, some have proposed legislation to address the issue. Proposed federal and state legislative responses to deal with bullying at work are analyzed. One option considers amendments to current federal worker safety legislation. Another possibility is the Healthy Workplace Law, a proposed statute that has been introduced in many state legislatures. However, the reality is that no state has yet to pass the law. The paper concludes with suggested alternatives to combat bullying that look outside of the legal framework.

Defining the Problem

Although everyone agrees that bullying occurs in the workplace, there is no consensus as to a definition. Workplace bullying has been examined in a number of different
disciplines, and each discipline views the issue through its own lens. Management studies have defined bullying in the workplace as “unwanted, offensive humiliating, undermining behavior towards an individual or groups of employees. Such persistently malicious attacks on personal or professional performance are typically unpredictable, irrational, and often unfair. This abuse of power or position can cause such chronic stress and anxiety that people gradually lose belief in themselves, suffering physical ill health and mental distress as a result.”

Psychology studies define workplace bullying as “behavior by an individual or individuals within or outside an organization that is intended to physically or psychologically harm a worker or workers and occurs in a work related context.” The Workplace Bullying Institute defines the issue as “repeated, malicious, health-endangering mistreatment of one employee (target) by one or more other employees (perpetrators). Include verbal abuse, offensive conduct/behaviors including non-verbal behaviors which are threatening, humiliating or intimidating — including work interference, such as sabotage — which prevents work from getting done. “One of the distinctions that needs to be made is between boss/supervisor/co-worker who is mean to everyone at work versus someone who is a bully – the bully targets an individual — he/she does not treat everyone badly. Contrary to what our mothers told us, the bully at work is not someone who feels badly about himself, rather it is about power, control and career advancement.” Remember Machiavelli (“power corrupts and absolute power corrupts absolutely”). Recent studies have found that those who score high on a Machiavellianism scale — which measures manipulative, amoral, deceitful practices (the end justifies the means) — have found that those with the highest scores appear most likely to engage in bullying at work.

David Yamada, a legal academic who has done much research in this area considers workplace bullying as “intentional infliction of a hostile work environment upon an employee by a co-worker(s) through both verbal and non-verbal behaviors.” In many work environments bullying is considered the way in which work gets done.

As there is no specific legal definition for workplace bullying, one must consider the three ways in which the courts have come to examine this issue, Title VII of the Civil Rights Act of 1964, common law tort remedies and administrative law workers’ compensation awards.

Title VII of the Civil Rights Act of 1964

Title VII was part of major civil rights legislation in the 1960s. The law prohibits employers from discriminating against any of the protected classes (race, color, national origin, religion, gender (including eventually pregnancy) in any employment action (hiring, firing, job assignments). Later legislation extended protection to other protected categories — including age and disability. In 1986, the United States Supreme Court determined that sexual harassment in the workplace based on a hostile work environment was a form of employment discrimination prohibited under Title VII.

To constitute harassment the conduct must be severe, ongoing and pervasive. “Simple teasing, offhand comments and isolated incidents (unless extremely serious) do not constitute sexual harassment based on a hostile work environment.” The conduct has to be bad enough to change the conditions of employment, but there is no need to show an adverse employment action to establish a hostile work environment, nor is it necessary to show actual injury. The court has to look at all of the circumstances. Would a reasonable person think this was harassment based on gender? It must be enough to unreasonably interfere with an employee’s ability to work effectively. In cases involving a hostile work environment, an employer will be held liable if the employer was negligent or failed to take steps to counter the abusive environment created by the supervisor or co-worker. In determining an employer’s vicarious liability for the acts of a supervisor/co-worker, one must look at the reasonableness of what the employer did and the reasonableness of what the plaintiff employee did. To avoid liability, where there was no adverse employment action, the employer has to show that the employer took reasonable steps to prevent sexual harassment and reasonable steps to correct the problem, and that the plaintiff did not take advantage of any of these steps — acknowledging that “it is now well recognized that hostile environment sexual harassment by supervisors (and for that matter, co-employees) is a persistent problem in the workplace.

An employer can, in a general sense, reasonably anticipate the possibility of such conduct occurring in its workplace, and one might justify the assignment of the burden of the untoward behavior to the employer as one of the costs of doing business, to be charged to the enterprise rather than the victim.” In a dissent in “a pervasively hostile work environment of sexual harassment is never (one would hope) authorized, but the supervisor is clearly charged with maintaining a productive, safe work environment. The supervisor directs and controls the conduct of the employees, and the manner of doing so may inure to the employer’s benefit or detriment, including subjecting the employer to Title VII liability.” Ultimately, the court has determined that whether or not sexual harassment, based on a hostile work environment, occurred is based on
what a reasonable person in the plaintiff’s position would think.17 “Recognizing liability for same-sex harassment will not transform Title VII into a general civility code for the American workplace, since Title VII is directed at discrimination because of sex, not merely conduct tinged with offensive sexual connotations; since the statute does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same, and the opposite sex; and since the objective perspective of a reasonable person in the plaintiff’s position, considering all of the circumstances.”18

Although harassment cases were originally based on gender, the other protected categories (race, national origin, religion – later statutes age, disability) are also covered by the statute as long as the plaintiff can establish that the harassment was motivated by the specific protected category. Two decisions from the 5th Circuit Court of Appeals granted summary judgment to the employer as most of the incidents that were described by the plaintiffs did not relate to race.19 The court determined that in looking at the facts in a manner that most favored the plaintiff, an African American man, only three of the twelve alleged incidents had a racial component. Those instances consisted of a colleague (both were supervisors) referring to the plaintiff twice as “boy” and on one occasion stating that she would “beat the tar off of (or out of) him. The court concluded that a claim of racially motivated hostile work environment could not be supported based on those remarks. In a case that went to trial, Yancieck,20 a white employee, argued that an African American co-worker was a bully (he did not comply with workplace rules – and got away with more than other employees, acting “rage ready to be unleashed,” allegedly staring at workers, bumping into them and invading their personal space. In one instance the plaintiff was working with the other employee and a 940 pound steel coil fell on plaintiff from the machine being operated by the African American employee – and it was dropped purposely because of his race. The court concluded that the co-worker was not pleasant, but that the harassment did not appear to be racially based, therefore, not protected under the statute.

Common Law Tort Remedies – Assault and Intentional Infliction of Emotional Distress

In the absence of harassment under Title VII, tort law represents another option for an employee in bringing an action based on workplace bullying. These allegations are usually seen together with Title VII claims. These cases usually involve allegations of assault and intentional infliction of emotional distress. Assault is defined as an intentional, nonconsensual act by defendant that gives rise to the apprehension and fear in the mind of plaintiff that he or about to be physically attacked. In a case that alleged assault without an allegation of being part of a protected category,21 the plaintiff successfully argued that defendant committed an assault. The facts included testimony that in the operating room, the defendant doctor started screaming and swearing, advanced on the plaintiff with clenched fists – the plaintiff backed up to the wall and put his hands up. The defendant, however, did not hit the plaintiff, rather he stopped, said that the plaintiff was “finished” and left the room. On appeal, the court concluded that the plaintiff proved by a preponderance of evidence that the defendant acted in such a way that it was reasonable for the plaintiff to be in fear of imminent harm as the doctor had the ability to cause the harm. Assault does not require physical contact as long as the plaintiff was reasonably afraid that he would be attacked. For assault to constitute legal liability, there must be a physical element – even if harm does not actually occur. Raess has been cited as the first case supporting workplace bullying as a legal option. However, the case – which is interesting in that harassment was argued in the absence of any protected category, does not actually provide a strike for employees arguing bullying in the workplace.

Intentional infliction of emotional distress is another intentional tort that may be applied in the context of workplace bullying. Its definition is not as clear as that of assault. Different states have different definitions. However most require (1) outrageous conduct by the defendant, (2) intent to cause or reckless disregard of the probability of causing emotional distress, (3) severe emotional suffering, and (4) actual and proximate causation.22 The Restatement Second of Torts defines the tort as: (a) Defendant intended to inflict emotional distress on the plaintiff; and (b) Defendant’s conduct was extreme and/or outrageous; and (c) Defendant’s actions caused plaintiff’s distress; and (d) Plaintiff’s distress was severe.23

Allegations of intentional infliction of emotional distress, rarely, if ever, are successful in the context of the employment relationship. Although the allegation is frequently put in the pleadings, it is rarely successful. As most employees are in an at-will relationship with their employers, few behaviors in the workplace will rise to the standard needed to establish this intentional tort. Further, in Abbott v. Conoco,24 the appellate court reversed and vacated the trial court’s decision that the defendant employer had committed an intentional infliction of emotional distress. In the case, the plaintiff who worked...
at a convenience store had stopped a store robbery. She was then fired because store policy prohibited employees from resisting a robbery.

**Administrative Regulations – Workers’ Compensation Laws**

Some have suggested that workers’ compensation statutes are the place to look for a remedy for bullying at work. Although every state creates its own workers’ compensation laws, the laws are quite similar. Workers’ compensation is a no-fault concept in which issues of responsibility are not considered. Employers pay premiums into workers’ compensation insurance. Benefits are defined under a clear-cut schedule – listing the value of each injury, including death. Although benefits vary state by state, non-permanent injuries tend to be based on a percentage of the employee’s salary. The amount of time that one can receive workers’ compensation is also listed. Remember the tradeoff – in exchange for fairly immediate payments – the employee may not sue the employer for the injury. The injury must have occurred in the course of employment. The statutes are designed to provide compensation to employees for injuries that occur at work that cause employees to lose worktime – thereby losing salaries and requiring medical expenses. The other side of the coin is that an employee may not sue an employer for liability; in most instances, workers’ compensation is the only relief available. The exclusive remedy concept of workers compensation is somewhat frayed. The Florida courts determined that in sexual harassment cases workers’ compensation should not be the exclusive remedy, but that an employee could receive benefits under workers’ compensation and also bring litigation under Title VII, the court stating that “workers’ compensation is directed essentially at compensating a worker for lost resources and earnings. This is a vastly different concern than is addressed by sexual harassment laws. While workplace injuries rob a person of resources, sexual harassment robs the person of dignity and self-esteem. Workers’ compensation addresses purely economic injury; sexual harassment laws are concerned with a much more intangible injury to personal rights. To the extent these injuries are separable, we believe that they both should be, and can be, enforced separately.”

An employee is going to get less under workers’ compensation than he/she might receive after a trial; however, the payment is going to be forthcoming much more quickly and usually with more certainty than through litigation. In most instances, workers’ compensation remains the sole remedy.

The Workplace Bullying Institute provides a less benign view of the use of workers’ compensation laws as a remedy for bullying. In addition to the concept of exclusive remedy, the article states that “most states do not recognize, or it is nearly impossible to succeed with a psychological workers’ compensation claim. Since the wounds of bullying are invisible, thus psychological, your state’s workers’ compensation system may frown on stress-related claims, and therefore, bullying or psychological abuse.” In addition, “psychologists and physicians who review cases as independent professionals nearly always find only that personality conflicts are responsible for bullying related claims and are dismissive about psychological abuse at work.” For workplace bullying to be covered under workers’ compensation, the injury must have occurred in the course of employment, and can lead to psychological problems, including but not limited to depression, stress and anxiety. To qualify for workers compensation based on a psychological injury (including stress), the employee must establish that the harassment experienced was greater than that which other employees in similar situations within the company experienced. Therefore, a workplace bully who treats everybody badly is off the hook under workers’ compensation laws.

In a recent New York case, the employee successfully argued that bullying by co-workers over a 3-year period, including name calling and physical threats, constituted a workplace injury. Based on the acts of co-workers, the employee’s supervisor transferred her to other locations. However, this did not stop the inappropriate behaviors by co-workers. The Workers’ Compensation Board determined that these acts, which went on for several years, caused her to have an occupational disease involving adjustment disorder, an occupational disease based on her work, and granted her claim. The case is a stretch as it appears that the claimant had lots of problems getting along with co-workers before events occurred at work. Although, workers’ compensation provides for relief based on stress in the workplace, some are concerned that workers’ compensation is not the appropriate venue for cases involving inappropriate behavior by co-workers and supervisors.

**Part II**

The limitations imposed by federal legislation under Title VII of the Civil Rights Act of 1964, common law torts and state legislation based on workers’ compensation laws, have led to various proposals to address workplace harassment. These include changes to current federal regulations such as those under the Occupational Health and Safety
Act (OSHA), development of state legislative proposals, and creation of new tort remedies under the common law. Some suggest that European models are an appropriate tool for dealing with issues of workplace harassment.

The issue is very much part of the current business landscape. A 2014 survey conducted by Zooby Analytics, commissioned by the Workplace Bullying Institute (WBI), indicated that more than 25% of the respondents had direct experiences with abusive conduct at work, and that 72% were aware of workplace bullying, although 72% of employers surveyed discount, encourage, rationalize or defend bullying. According to WBI’s website, the current survey provided a definition of workplace bullying as “repeated mistreatment” and a form of “abusive conduct” indicating that only the most serious infractions should be considered in answering the survey.

The proposal that has gotten the most traction is the Healthy Workplace Act (HWA), which was first developed by David Yamada in 2004. Since then the proposed legislation has made its way through academic journals, popular websites and state legislatures. More than half of the states in the United States have had Healthy Workplace legislation introduced into their legislatures, but no state has passed the legislation (www.healthyworkplacebill.org, last viewed June 25, 2015). For example, New York legislators have introduced this bill to amend current New York labor law every year since 2007. However, it has never become the law.

The major thrust of the Healthy Workplace legislation is that the wrong of workplace bullying should not be limited to a particular status (i.e.: race, gender), and that the bullying need not be related to a specific protected category. The theory makes sense. Why should an employee who is bullied because of her gender be protected if the bullying relates to her gender but not be protected if the bullying does not relate to her protected status? The proposed legislation attempts to deal with bullying at work that does not fall within the protected categories. Its central hypothesis is that bullying should not be legally defensible as against any person, even if that person does not have protected status under federal law and the harassment is not directly related to that protected status.

In many ways, HWA mirrors the language of the courts in determining what constitutes sexual harassment under Title VII. To qualify under HWA, the target (HWA’s language for the alleged victim) must be subjected to an abusive work environment which “exists 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.” The behavior must be persistent and significant to the extent that it causes physical or psychological harm. The perpetrator (the employer or other employees) must act with malice – i.e., knowledge that that the behavior is intentional, that the bully knows what he is doing or that a reasonable person would conclude that the bully knows what he is doing. Malice, the desire to see someone suffer harm without any legitimate reason, can be inferred by the conduct of the individual. The malice requirement is similar to the requirement for intentional infliction of emotional distress tort cases under the common law. To constitute a wrongful act, the court requires that the plaintiff establish by a preponderance of evidence that the defendant intended to harm the plaintiff or acted in such a way that harm was likely to occur.

The intent to harm, or malice requirement of HWA, is not seen in court decisions under Title VII. In Harris v. Forklift the U.S. Supreme Court ruled that a person could establish sexual harassment based on a hostile work environment without the need to show psychological or emotional harm. In Harris, the Court determined that a reasonable person could find the acts of Ms. Harris’ boss offensive enough to constitute harassment, although Ms. Harris did not suffer any physical or emotional harm. It is interesting that HWA included the intent requirement.

Outside of the intent requirement, the Healthy Workplace bill mirrors the language of a hostile work environment based on sex that has been developed by the courts, that is, the disputed conduct must be severe, pervasive and ongoing. In addition, there is an exception for behaviors that are so bad, “egregious,” that a single act would constitute a wrong, and a caveat that exploiting a person’s known weaknesses is to be considered an aggravating factor.

HWA specifies that retaliation constitutes an unlawful employment practice. This includes retaliation against an employee who has made an accusation, even though the underlying charge is unfounded. Again, this is something that the courts have addressed. For example, an employer may be found not liable for harassing an employee based on her gender, yet liable for taking certain forms of retaliation.

Another requirement of the proposed legislation is that the employee must notify the employer of the situation, and the employer must try to correct the problem. HWA protects an employer against a bullying complaint if the employer tried to prevent the conduct and took appropriate measures, and the employee did not take advantage of the preventive steps. This employer defense is available only when the employee has not suffered any adverse employment action, such as job loss. Again, this language is similar to that used by the courts. HWA adopts a defense for employers that the court established relating to sexual harassment. If the bullied employee does not
suffer tangible harm (e.g.: getting fired), and the employer has a procedure in place to deal with harassment — but the targeted employee did not use the procedure — then the employer will have no liability. If there has been a tangible loss, this defense is not available to the employer.

The proposed bill allows the employee to sue for a variety of remedies, including damages, back pay & reinstatement. However, if there is no negative employment action, emotional distress and punitive damages can only be awarded against the employer if the “actionable conduct was extreme and outrageous.” Other states have proposed damages for emotional harm limited to $25,000 when there has been no adverse employment action. The proposed legislation prohibits a person from seeking relief under HWA if the individual has received workers’ compensation benefits. New York’s proposed legislation requires the employee to bring an action within one year of the “last act that constitutes an alleged violation.” Other states have been praised for improving on the Healthy Workplace Bill, including the use of mediation and arbitration rather than litigation as a way of mollifying employers. Others suggest that there should not be a requirement of emotional or psychological harm, and that the standard developed in the HWA is higher than that of the courts under Title VII and more akin to an intentional tort under IIED. But the bottom line is that to date, no legislature has adopted the Healthy Workplace Law.

Changes in Tort Law

Others have argued that workplace bullying should be addressed through the common law, suggesting a modification to the tort of intentional emotional distress. As discussed in Part I, to date the courts have not been receptive to any but the most extreme forms of abusive conduct. The argument is that rather than emotional distress, the tort would be named intentional infliction of workplace abuse, providing a definition of bullying behavior as: “Exposure by the targeted employee to at least two negative acts on a weekly basis for at least 6 months, resulting in mental or physical harm to the employee and in situations where the employee finds it difficult to defend or stop the abusive acts.” After establishing the definition of bullying, the modified tort itself is defined as having three prongs. They are: (i) The conduct must be intentional or reckless and occur at work; (ii) The conduct must result in actual bullying (as previous defined); and (iii) The conduct results in emotional and/or physical harm.

The Right to Dignity in the Workplace

Still others argue that looking at workplace bullying as a form of discrimination is not the correct mindset. Proposed legislation such as the Healthy Workplace bill, as well as suggested modifications to current tort law, tend to focus on liabilities and entitlements. The focus is on discrimination and monetary compensation. Some have argued that the issue is one of having the right to safety and dignity in the workplace. European countries have looked at the issue from that perspective, concentrating on safety and respect in the workplace. The argument is that the focus should be on dignity at work, and that the right to a civil workplace should be a human right. Some have argued that OSHA is the correct place to address workplace bullying, as OSHA’s general duty clause requires employers to furnish to employees a workplace which is free of recognized hazards that are causing or likely to cause death or serious physical harm to employees. The argument in using OSHA is that workplace violence could definitely be considered a hazard (bullying being one type of harm). However, the law as currently written only refers to physical harm. Some have suggested that specific regulations are needed to deal with bullying, rather than relying exclusively on the general duty clause, and that a specific standard is appropriate given the evidence of “prevalence, costs, and health impact of workplace bullying.” As seen throughout this article, workplace bullying tends to do more psychological harm, rather than physical harm. Critics of OSHA argue that OSHA refuses to regard bullying as a serious problem despite research that shows that workplace bullying may cause severe damage to the victim’s mental and physical health. Further, use of OSHA has certain drawbacks — many argue that the penalties are not adequate and that compliance is low, and has no private cause of action.

The model suggested through OSHA is being implemented in several European countries. Sweden was the first European nation to pass legislation dealing with bullying in the workplace. The statute places affirmative requirements on the part of the employer, requiring intervention to stop harassment at work. In addition, the employer must attempt a collaborative process to resolve disputes. The employer can be charged with a fine for failing to abide by the law. However, there is no private cause of action. Great Britain passed the Protection from Harassment Act in 1997. The statute was developed as an anti-stalking law but is used to deal with workplace bullying. Under
the law, an employer will not be held liable unless liability is “just and reasonable.” The definition of harassment is vague, but English courts have interpreted harassment as conduct: (i) occurring on at least two occasions, (ii) targeted at claimant, (iii) calculated in an objective sense to cause distress.61 France also has legislation dealing with workplace harassment and the right to dignity at work.62 The law provides that a single act can constitute a wrongful act. In brief, unlike the United States, Europe tends to see the problem as a health and safety issue, requiring a workplace free of bullying as part of the need for safe work conditions.63

Some have argued that this model of seeing the issue as one of health and safety should be incorporated into U.S. law. Recent mainstream media articles have looked at the issue from a health standpoint, arguing that incivility and bad behavior have a negative effect on employees’ health, performance and morale, citing a study published in 2012 that tracked women for 10 years and determined that stressful jobs increased the risk of a cardiovascular event by 38 percent.64 Further, Porath argues that incivility at work has grown from 25% in a study by the author in 1998 (the employee was treated rudely at least one time a week). By 2011 the number was more than 50%. She believes that one of the reasons for the increase is technology “We can take out our frustrations, hurl insults and take people down a notch from a safe distance.” Further, some of the most successful business people have very bad reputations for the ways in which they treat employees.65 While lauding the innovations and creativity of Elon Musk (Tesla), Jeff Bezos (Amazon) and Steve Jobs (Apple), Schwartz finds it troubling as to “how little care and appreciation any of them give (gave) to employees and how unnecessarily cruel and demeaning they could be to the people who made their dreams come true.”

So we know that there is a problem, we have looked at various ways of correcting the problem, but to date there has been no success. It appears that bullying in the workplace may be a subject that should not be amenable to being regulated through the courts or through legislation. Research has shown that a civil workplace is a more effective work environment, that more work gets done, and the work gets done better. If we can also establish that civility in the workplace lessens other business costs, such as health insurance or the cost of replacing employees who leave or take off days from work, then we have a true victory. Perhaps an alternative model that includes cooperation from the various stakeholder groups, employees, employers, government, and unions, using compliance incentives is a path worth trying.66 A step in that direction can be seen in recent legislation passed in California, Tennessee and Utah.

California is the first state to try to deal with the issue of workplace bullying behavior that is not covered by current federal or state law. As of January 1, 2015, employers in California with 50 or more employees are required to include training regarding workplace bullying (defined as abusive conduct) within the two hours of training regarding sexual harassment that is required of all supervisory employees every two years.67 This is in addition to the requirement of training to deal with sexual harassment that is already in place in California since 2004. The new law does not state how much time should be spent on workplace bullying within the two-hour training program. The new law defines abusive conduct as: “…conduct of an employer or employee in the workplace, with malice, that a reasonable person would find offensive and unrelated to an employer’s legitimate business interests.” The use of the term malice is important. As previously stated, malice requires intent to harm. It is conduct that a reasonable person would find threatening or intimidating. It has been suggested that training should be directed to ensuring that supervisors do not act impulsively, and to provide supervisors with appropriate tools.68 What the new legislation does is to develop a civility code.69 The California statute was amended in 2016 by the FEHA regs.70 The regulation allows the Department of Fair Employment and Housing to seek remedies against an employer for failing to deal with discrimination in the workplace even if the underlying discrimination is not successful. However, the remedies sought by the agency must be non-monetary and preventative in nature.

Tennessee passed the Healthy Workplace Act in 2014.71 Unlike the California law, the Tennessee statute applies only to state and local governmental entities.72 The purpose of the law is intended to help prevent abusive conduct in the workplace. “Abusive conduct” means acts or omissions that would cause a reasonable person, based on the severity, nature and frequency of the conduct, to believe that an employee was subject to an abusive work environment, such as: (A) Repeated verbal abuse in the workplace, including derogatory remarks, insults and epithets; (B) Verbal, nonverbal, or physical conduct of a threatening, intimidating, or humiliating nature in the workplace; or (C) The sabotage or undermining of an employee’s work performance in the workplace.

Unlike the California law, the Tennessee law does not require intent or malice. Both laws use the reasonable person standards. The law requires the Tennessee Advisory Commission on Intergovernmental Relations (TACIR) to develop a model policy for employers to prevent abusive conduct in the workplace.73 Although not required, if the public employer adopts the model policy or one that is
similar to the model policy, “the employer shall be immune from suit for any employee’s abusive conduct that results in negligent or intentional infliction of mental anguish.” The law supplements legislation that protects employers from employees’ intentional acts against other employees. In this way, the legislation is similar to the affirmative defense available under Farragher and Ellenh in terms of sexual harassment.

Utah’s statute went into effect in 2015. It requires state agencies to provide training for supervisors. Its definition of abusive conduct includes “exploit(ing) an employee’s known physical or psychological disability.” The law applies only to state agencies, but requires state agencies to train supervisors every other year. The law also requires the training to include the employee grievance process. Employers are required to explain how they will assist those employees who have been subjected to abusive conduct at work. Although the statute does not create a new cause of action, it does not necessarily limit the options available to an employee.

The new laws move from a focus on discrimination and harassment to the need for a more respectful work environment. Can these statutes act as a roadmap to employers in other states? Is training the answer? Employers long-ago jumped on the training bandwagon to deal with issues involving sexual harassment. However, the “carrot” to training was paved with the “stick” of litigation. Without the threat of litigation, it appears, based on the research, that employers will not be subject to liability for bullying behavior unless it reaches the outrageous category. Will employers be willing to deal with bullying through training?

Employers have to be able to see the impact of bullying in the workplace. To get employers to sign on, one needs to show that bullying can have an adverse effect on the victim, on others in the organization and on the business as a whole. The focus needs to be on the benefit to the employer of a civil workplace. One can argue that bullying can increase productivity at first; it is likely that in the longrun it will result in lack of engagement and increased turnover as nobody wants to work in a place where they are demeaned. Studies have demonstrated that abusive behavior negatively affects the organization and other employees as well as the victim. Can we make the case to businesses without the need for legislation?

It certainly seems that trying to make the workplace more civil is an effort worth trying, a no-brainer, a win-win. However, it let us conclude with a word of caution. In Hispanics United, the employer had a policy of “zero tolerance” prohibiting bullying and harassment. Some employees posted nasty remarks about co-workers on Facebook. The employees who posted the remarks were fired and brought the issue to the National Labor Relations Board (NLRB). The NLRB found that such a policy is not prohibited as it prevents employees from engaging in a “concerted activity” which is allowed under our labor laws. The NLRB ordered that the fired employees had to be reinstated. The NLRB’s position may make anti-bullying policies difficult to enforce. To avoid problems in training employees, the focus should be on individual, rather than group behavior. The NLRB focuses on protecting concerted activity, that is, a number of employees working together. Therefore, anti-bullying activities should focus on preventing individual negative behaviors. In training, provide examples of inappropriate behavior. Training works best if people are engaged. Ask how situations can be remediated. Concentrate on actions.

A civil workplace is in everyone’s interest. Managers have to buy into setting a positive tone. Get employees involved, concentrate on ideas that improve the workplace environment rather than focusing on what not to do. Develop a training program that works. “At the very least, training should remind employees and managers that they have a responsibility to contribute to achieving a healthy and civil work environment that does not tolerate bullying. At the very best, training programs should include skills such as conflict resolution, negotiation, interpersonal communication, assertiveness, empathy, stress management, leadership, optimism and self-examination...valuable skills that promote a healthy workplace.” In light of the limitations of the litigation model, employer initiatives, together with legislation requiring employers to develop training programs, may be a better answer to the problem of workplace bullying.

ENDNOTES

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BULLYING IN THE WORKPLACE: NOT EVERY WRONG HAS A LEGAL REMEDY

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56 Id. at 811.
60 Yancik v. Hanna Steel Corp., 653 F.3d 532 (7th Cir. 2011).
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