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Workplace Bullying: What Should You Do To Stop It?

Law360, New York (November 12, 2013, 12:44 PM ET) -- Do you work with a workplace bully? There is no current federal or state law in the United States expressly prohibiting workplace bullying. This soon may change as 25 states have introduced legislation that would make workplace bullying illegal, 11 of which remain active.

Even without workplace anti-bullying legislation, there are good reasons for employers to address bullying concerns in the workplace. First, left unchecked, employees may assert claims related to bullying by attempting to squeeze these claims into violations under existing laws. Second, if prevalent, bullying conduct clearly impacts productivity in the workplace.

Growing concern about workplace bullying has led to efforts to curb such behavior on several fronts. State legislators have been actively introducing anti-bullying legislation across the country. Concurrently, many employers have addressed and discouraged anti-bullying conduct through the implementation of internal procedures and policies promoting mutual respect in the workplace and implementing training focused on discouraging abuse in the workplace.

Proposed Anti-Bullying Legislation in the U.S.

Since 2003, 25 states have introduced workplace bullying legislation that would allow workers to sue for harassment due to bullying without showing evidence of discrimination based on a protected characteristic.

Of the 25 states, many have introduced some iteration of the Healthy Workplace Bill, crafted by Suffolk University law professor David Yamada. In fact, on April 15, 2013, Pennsylvania State Representative Mark B. Cohen, D-Philadelphia, joined by several co-sponsors, introduced an iteration of the Healthy Workplace Act.

The stated purpose of the Pennsylvania bill is to “provide legal redress for employees who have been harmed physically or economically by deliberate exposure to abusive work environments and to provide legal incentives for employers to prevent and respond to abusive treatment at work.”

The bill prohibits any employee from being subjected to an "abusive work environment" which is defined as "[a]n employment condition when an employer or one or more of its employees, acting with an intent to cause pain or distress to an employee, subjects the employee to abusive conduct that causes physical or psychological harm."

Abusive conduct is defined as:

Acts or omissions that a reasonable individual would find abusive, based on the severity, nature, and frequency of the conduct, including, but not limited to: (1) repeated verbal threats of abuse by the use of derogatory remarks, insults, and epithets; (2) verbal, nonverbal or physical conduct of a threatening, intimidating, or humiliating nature; or (3) the sabotage or undermining of an employee's work performance.

The bill also prohibits an employee or employer from retaliating in any manner against any employee who has opposed an unlawful employment practice under this act or testified, participated or in any manner assisted in an investigation or proceeding relating to workplace bullying.

The prohibition against abusive workplace conduct is enforceable through a private right of action, whereby an aggrieved employee may bring a civil suit within one year of the last violation against an abusive employee or against the employer, under a theory of vicarious liability. Remedies for this conduct include: injunction, reinstatement, removing of the bully from the claimant's work environment, reimbursement of lost wages, front pay and medical expenses, compensatory damages for pain and suffering or emotional distress, punitive damages and attorneys' fees.

New York and New Jersey have introduced slightly different versions of the Healthy Workplace Bill. New Jersey's Health Workplace Bill, Senate Bill No. 333, was introduced in the New Jersey State Senate in early 2012. Senate Bill No. 333 prohibits subjecting an employee to "abusive conduct" or permitting "an abusive work environment."

The New Jersey bill defines "abusive conduct" differently than the Pennsylvania bill as "the malicious conduct of an employer or employee in the workplace that a reasonable person would find hostile, offensive or unrelated to an employer's legitimate business interest."

Abusive conduct includes, without limitations, "repeated infliction of verbal abuse such as the use of derogatory remarks, insults, and epithets; verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating; or the gratuitous sabotage or undermining of a person's work performance." A single act is not considered abusive conduct under the bill "unless it is especially severe and egregious."

The New Jersey bill also differs from the Pennsylvania iteration because it caps an employer's pecuniary penalty for knowingly and willingly violating the provisions of the act at $25,000.

On Feb. 13, 2013, Assemblyman Steve Englebright reintroduced a version of the Healthy Workplace Bill in the New York State Senate. An identical bill was introduced into the New York State House on Feb. 25, 2013. Like the New Jersey and Pennsylvania versions, this bill provides abused employees a private right of action to redress workplace bulling.

The New York bill uses similar definitions of "abusive conduct" and "abusive workplace environment" to those in the New Jersey bill. Pursuant to the New York bill, if an employee successfully establishes an abusive work environment claim, he or she may be awarded reinstatement, removal of the offending party from the plaintiff's work environment, reimbursement for lost wages, front pay, medical expenses, compensation for pain and suffering, compensation for emotional distress, punitive damages and attorneys' fees.

The Pennsylvania, New Jersey, and New York versions of the bill all afford employers the chance to avoid liability for abusive work environment claims if they exercised reasonable care to prevent and promptly correct the abusive conduct, and the aggrieved employee failed to take advantage of appropriate preventative or corrective opportunities provided by the employer.

It is unclear when, if ever, these bills may be enacted into law. Regardless, the widespread introduction of such anti-bullying in workplace bills demonstrates that state legislatures are paying attention to concerns raised by bullying in the workplace. Thus, it is prudent for employers to similarly be aware of these issues.

Anti-Bullying Policies

Some employers have sought to deter bullying conduct in the workplace by adopting various provisions in employment policies or employee handbooks that address bullying. Employers have implemented vastly different policies. Some policies expressly prohibit workplace bullying while others address the issue indirectly with policies requiring mutual respect between employees.

Employers considering implementing anti-bullying policies may want to include language emphasizing the purpose of the policy (i.e., to prevent workplace bullying and promote mutual respect). A policy should also contain a clear definition of prohibited bullying behavior and an illustrative list of examples, a statement encouraging employees to report behavior prohibited under the policies to designated positions, a statement that complaints will be investigated and appropriate corrective action will be taken and a prohibition on retaliation for good faith reports.

Employers Already Face Liability as a Result of Workplace Bullying.

Even in the absence of bullying legislation, employers should be mindful that bullying-type behavior currently puts them at risk of legal liability. Employees currently seek redress for bullying behavior under federal, state and local laws prohibiting discrimination, harassment and retaliation, as well as under state tort laws and via workers' compensation.

Discrimination and Harassment

In order to bring claims under federal, state and/or local discrimination or harassment laws, employees must allege a connection between the alleged abusive behavior and the employee's membership in a protected class, such as race, religion, color, national origin, sex or disability. These sorts of claims are far from uncommon.

For example, in Wilson v. Laitram Corp., 131 F. Supp. 2d 826 (E.D. La. 2001), an African-American employee brought a Title VII race discrimination claim against her employer on the basis that her supervisor knew but did not thwart the bullying conduct she experienced from several nonsupervisory employees. Id. at 827.

The employee alleged that several Caucasian employees bullied her by making false accusations that she was sleeping on the job and taking long breaks; watching her work; placing a picture of a poorly drawn woman on her desk with the phrase "Don't make me open a can of whup butt young lady. SMILE! P.S. — no I don't have anything better to do;" and yelling at her using derogatory phrases including racial epithets. Id. at 828-29.

The claimant complained about the bullying conduct, and when she was terminated, she alleged her termination constituted retaliation for her complaints about the bullying. The U.S. District Court for the Eastern District of Louisiana denied the employer's motion for summary judgment on the Title VII claims, finding that the employee had established a prima facie case for race discrimination and that there were fact issues regarding whether the nondiscriminatory reason proffered by her termination was pretextual. Id. at 834.

Another disquieting example is presented by Espinoza v. County of Orange, GO43067 (Cal. Ct. App. Feb. 9, 2012). Espinoza was born with a right hand that had no fingers or thumb, but only two small stubs. Id. at *1. The claimant worked at the Orange County Probation Department, where one of his co-workers maintained a blog called "keepingthepeace." Id. An anonymous poster on the site promised $100 to anyone who could get a picture of the "claw," referring to claimant's hand.

After Espinoza reported this conduct, employees posted more derogatory comments about Espinoza. Not surprisingly, the cyberbullying and harassment spread from the blog to the workplace. Although the claimant told his superiors multiple times about the harassment, the supervisors took little action to stop the conduct.

The claimant brought a discrimination claim on the basis of disability against his employer. After trial, the employer was found liable for the harassment and its failure to take corrective action. This decision stands as a red flag for employers by demonstrating how employers may face liability for inadequately addressing workplace bullying.

In some circumstances, establishing a connection between the abusive behavior and a protected characteristic can be difficult for a bully victim to make, precluding the individual from securing redress for the abusive conduct under federal and state discrimination or harassment laws.

In fact, employers have argued they are not liable for abusive conduct committed by supervisors or employees under federal and state discrimination and harassment laws by presenting evidence that the alleged bully is an equal opportunity harasser, whose abuse is unrelated to any protected characteristic.[1]

If the proposed anti-bully legislation becomes law, it will prevent employers from successfully using this defense because it will untether a victim's ability to recover for being subjected to an abusive work environment from the victim's having a protected characteristic.

State Law Claims

At present, potential claimants may also attempt to recover for abusive conduct by asserting claims under the tort of intentional infliction of emotional distress. Relief under this tort does not require establishing a connection between the abusive conduct and a protected characteristic.

To establish such a tort claim, most states require a plaintiff to prove that the defendant acted intentionally or recklessly and exhibited extreme and outrageous conduct that caused the plaintiff emotional distress. Although it is often difficult for a plaintiff employee to prove "severe and outrageous" conduct on the part of the defendant employer, it is certainly not impossible to do so.

Moreover, any employer who hires or retains an employee who threatens or exhibits abusive conduct may be liable for negligent hiring, supervision and/or retention. Other potential claims that encompass bullying behavior include negligent infliction of emotional distress, defamation and assault.

Workers' Compensation Acts

Employees or an employee's beneficiary may also seek redress for workplace bullying via the workers compensation system. For example, under Pennsylvania's workers compensation law, employees may recover for mental injuries suffered as a result of "mental stimulus," which can include work-related stress, regardless of whether the alleged conduct was inspired by discriminatory animus related to a protected classification (referred to as "mental/mental" cases).[2]

In order to recover for psychological injury arising from mental stimulus, however, an employee must meet a high standard and establish both that the employee has sustained an injury caused by employment; and that an abnormal working condition caused the injury. Id.

Employee-claimants have had some success bringing mental/mental claims for injuries incurred as a result of workplace bullying. In McDonough v. Workmen's Compensation Appeal Board (Com. of Pa., Dep't of Transp.), 470 A.2d 1099, 1100 (Pa. Commw. Ct. 1984), William McDonough alleged that from 1962 to 1970, his supervisor bullied him by singling him out and criticizing him loudly so that other employees could hear. Id. at 1100.

A doctor testified that as a direct result of this treatment, McDonough suffered from panic disorder associated with hyperventilation, anxiety disorder and dependent personality disorder. Id. Although McDonough's initial request for workers' compensation benefits was denied, the Pennsylvania Commonwealth Court reversed and remanded the decision, holding that McDonough's allegations that he suffered psychological injuries as a result of being subject to frequent, loud criticisms sufficiently established a mental/mental claim. Id. at 1101.

While employers may face liability under current law for tolerating bullying in the workplace, employers are also advised to be cautious in their treatment of alleged bullies. Singling out a bully by suggesting the worker seek counseling to address the abusive behavior or suggesting the bully may suffer from psychological problems could engender potential liability for the employer under the Americans with Disabilities Act or state disability laws.

In Gliha v. Butte-Glenn Community College Dist., 12-cv-02781 (E.D. Cal. June 14, 2013), a former employee alleged that his termination violated the California Fair Employment and Housing Act, which prohibits adverse employment action on the basis of actual or perceived disability, because his supervisor accused him of having "passive-aggressive" disorder and that this perception motivated his termination. In addition to being accused of being passive-aggressive, the employee alleged his supervisor also accused him of bullying.

The U.S. District Court for the Eastern District of California dismissed the employee's disability claim, noting that the plaintiff did not offer evidence he suffered from passive-aggressive disorder and in fact, denied such diagnosis; the former employee also did not establish that passive-aggressive disorder is a disability under the FEHA.

This case, nonetheless, is instructive in its suggestion that employers may open themselves up to ADA liability through their investigation of an alleged bully if the employer suggests in any way that the alleged bully is suffering from a mental disorder.

Conclusion

Even though the United States currently lacks federal or state laws expressly prohibiting bullying in the workplace, workplace bullying can expose employers to liability under various federal and state laws and dampen workplace productivity. Employers are advised to pay attention and respond cautiously to workplace abuse.

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[1] See Aguilera v. Fluor Enterprises Inc., 10-cv-95 (N.D. Ind. July 31, 2012) (granting employer's motion for summary judgment on former employee's Title VII harassment claim, noting the defendant presented evidence the harasser was an "equal opportunity bully."); Yancick v. Hanna Steel Corp., 653 F.3d 532, 546 (7th Cir. 2011) (affirming grant of summary judgment for employer on § 1981 harassment claim, noting the alleged harasser was an "equal opportunity bully.").

[2] Whiteside v. W.C.A.B. (Unisys Corp.) 650 A.2d 1202, 1205 (Pa. Commw. Ct. 1994); Cmty. Empowerment Ass'n v. W.C.A.B. (Porch), 962 A.2d 1, 6 (Pa. Commw. Ct. 2008).