

Legislating Workplace Bullying

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Anti-bullying rules have become a norm in our schools, but do general anti-bullying laws belong in our workplace? Federal and state laws already protect a vast percentage of our workforce from workplace discrimination: gender, national origin, religion, ancestry, age and disability laws have been designed to prevent/protect qualifying employees from discrimination and harassment in the workplace. Some state laws also protect sexual orientation and gender identity. However, outside of various common law claims such as assault, battery and intentional infliction of emotional distress there are no laws on the books which statutorily protect all employees from workplace bullying.

There is no question that bullying in any form is harmful to the victim. Our news has been filled with stories of school bullying which can lead to devastating results including suicide. Research on workplace bullying began in the 1980s in Sweden and the field has exploded. A Google search will reveal countless articles and books on the subject, examining workplace bullying from all angles, and most specifically exploring the psychological impact and harm harassment in the workplace can cause.

The US is actually the last of the western democracies to consider laws forbidding workplace bullying. Scandinavian nations as well as many of the European Union nations have explicit anti-bullying laws in place. In 2011 Australia passed the first criminal law prohibiting workplace bullying.

Anti-bullying legislation has been getting significant attention over the past few months in the US in the wake of the Miami Dolphins bullying scandal which ended with one player checking himself into a hospital for psychiatric help, having been subjected to pervasive bullying by his team mates. Just this past week the Dolphins helped introduce the Safe Athletics Education and Training Act of 2014 to the Florida State Legislature. If passed, the act would prohibit bullying in intercollegiate athletic events and would also require professional sports franchises to take reasonable measures to prevent abusive conduct. While this particular bill focuses upon the athletic world, there is a grass roots campaign to encourage all states to enact workplace anti-bullying legislation.

Since 2003, 25 states have introduced workplace bullying legislation that would allow workers to sue for harassment, without requiring a showing of discrimination. The proposed legislation was born in 2001 by Suffolk University Professor of Law David Yamada, who drafted the text of the Healthy Workplace Bill (HWB). The HWB was introduced in California in 2003 and thereafter, New York. The bill has successfully passed committee votes in Illinois, Washington, New York and Connecticut; passed House floor votes in New York for a study only bill and passed both houses in Illinois as a Joint Resolution. In 2010, the Senates in New York and Illinois passed the bill. It is likely only a matter of time before the HWB becomes law in one or more states. It is the

hope of HWB supporters that eventually the HWB will become law in all states, just like the school bullying laws. See, Healthy Workplace Bill, www.healthyworkplacebill.org.

What is workplace bullying? It is defined as the repeated, health-harming mistreatment (i.e. verbal abuse, offensive conduct that is threatening or humiliating, work interference) of one or more persons by one or more perpetrators. Basically, it is workplace harassment. Supporters of the HWB maintain that 49% of adult Americans have been bullied or witnesses bullying at work and that 80% of workplace bullying is “legal”, i.e. not covered by existing discrimination laws. Despite these statistics, only about 56% of companies implement workplace bullying policies, according to a study conducted by the Society for Human Resources Management (SHRM). HWB supporters believe that the existence of legislation is the most efficient way to get all employers to enact these policies.

What would anti-bullying legislation look like? In January of 2013 an anti-bullying bill was introduced in Massachusetts. Under this bill, if an employer is found to have created an abusive work environment, the court could order relief similar to the relief available under Title VII and its progeny: back pay, front pay, medical expenses, removal of the offending party from the work premises, reinstatement of the bullied employee, emotional distress damages, punitive damages and attorney’s fees. Employer defenses are similar to those under Title VII as well. An employer can escape liability by showing it exercised reasonable care to prevent and promptly correct any actionable behavior.

Critics of the anti-bullying legislation contend that these laws would encourage frivolous lawsuits. While most employers as well as employees agree that there is no place for bullying, harassment or mistreatment in the workplace, protecting workers from bullying while also shielding employers from scores of meritless claims is daunting. The proposed legislation is so expansive that even the disgruntled employee would become a potential plaintiff. Filling the courts with claims of “he was mean to me” or “she doesn’t like me” seems reckless and frivolous.

Another issue with anti-bullying laws and policies is the possibility that they violate the National Labor Relations Act. In *Hispanics United of Buffalo, Inc.*, 359 NLRB No. 37 (2012), the employer discharged four employees after they posted comments about a co-worker on Facebook. The employer justified the discharge using its anti-bullying policy. The National Labor Relations Board found that the four employees were engaged in concerted protected activity because they were discussing complaints about their performance. The Board held that the employer violated Section 8(a)(1) of the Act when it discharged the four employees for bullying and ordered the employer to reinstate the employees. Employers may avoid this result by carefully drafting anti-bullying policies and consulting with experienced counsel before taking disciplinary action against employees accused of bullying.

Enactment of anti-bullying legislation could very well be one of the biggest things to happen in the world of employment law since the passage of Title VII given its wide-spread applicability to all employees. If anti-bullying laws are to become a reality, state lawmakers will need to carefully craft the statute in an attempt to both protect employees from harmful workplace bullying while also shielding employers from an avalanche of frivolous litigation.

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