

Bullying in the Workplace

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BULLYING IN THE WORKPLACE

by Robert B. Fitzpatrick, Esq.¹

1. On May 12, 2010, the New York State Senate, by a 45-16 vote, passed S. 1823-B (*available at* <http://open.nysenate.gov/legislation/api/1.0/html/bill/S1823B>), which would create a private cause of action for what the proposed legislation calls “an abusive work environment.” The legislation now goes to the labor committee of the Democratic-majority New York State Assembly for vote at a to-be-determined date. For a comprehensive report on the bill, see Sarah E. Needleman, *For Business, Bully Lawsuits May Pose New Threat*, Wall St. J., May 26, 2010, *available at* <http://online.wsj.com/article/SB10001424052748704717004575268701579722946.html?mod=outsidein>; see also *An Eye on New York Workplace Bullying Legislation*, Posting of John Ho to the New York Labor & Employment Law Report, *available at* <http://www.nylaborandemploymentlawreport.com/2010/05/articles/harassment/an-eye-on-new-york-workplace-bullying-legislation/> (May 26, 2010). See also E.J. McMahon and James Copland, *New York’s latest job killer: A new bill would give workers broad rights to file suit when fired*, NYDailyNews.com, May 19, 2010, *available at* http://www.nydailynews.com/opinions/2010/05/19/2010-05-19_new_yorks_latest_job_killer_a_new_bill_would_give_workers_broad_rights_to_file_s.html.
 - a. The proposed legislation defines “abusive conduct” as follows:

“Conduct, with malice, taken against an employee by an employer or another employee in the workplace that a reasonable person would find to be hostile, offensive and unrelated to the employer’s legitimate business interests. In considering whether such conduct is occurring, the trier of fact should weigh the severity, nature and frequency of the conduct. Abusive conduct shall include, but not be limited to, 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 an employee’s work performance. A single act shall not constitute abusive conduct, unless the trier of fact finds such act to be especially severe or egregious.”
 - b. Malice is defined as the “intent to cause another person to suffer psychological, physical, or economic harm, without legitimate cause or justification.” And, malice “may be inferred from the presence of factors such as outward expressions of hostility, harmful conduct inconsistent with an employer’s legitimate business interests, a continuation of harmful and illegitimate conduct after a complainant requests that it cease or attempts to exploit the complainant’s known

¹ This article was prepared with assistance by Donald R. McIntosh, an associate with Robert B. Fitzpatrick, PLLC. Mr. McIntosh is a May 2008 graduate of Georgetown University Law Center and a member of the Virginia State Bar.

psychological or physical vulnerability.” Both physical and psychological harm must be documented or supported by a competent physician or competent expert evidence.

- c. The proposed legislation has an affirmative defense akin to the *Faragher/Ellerth* affirmative defense used in federal sex harassment cases. There is a one-year statute of limitations, running from the last abusive conduct which is the basis of the allegation of an abusive work environment.
 - d. Remedies include lost wages, medical expenses, compensation for emotional distress, punitive damages, and attorneys’ fees. If the employer’s abusive work environment did not result in a “negative employment decision,” defined as a termination, constructive discharge, demotion, unfavorable reassignment, refusal to promote, or disciplinary action, then the employer’s liability for damages for emotional distress is capped at \$25,000 and it shall have no liability in such circumstances for punitive damages.
2. One likely fountainhead of this legislation and its companions around the country (discussed *infra*), is studies and surveys describing the numbers of employees who report having experienced varying forms of workplace “bullying.” For example, the New York lawmakers cited to some 16% to 21% of employees as having experienced “health-endangering workplace bullying, abuse and harassment.” See Needleman, *supra* (further, “such behavior is four times more prevalent than sexual harassment”). In 2007, a survey of 7,740 people by the Workplace Bullying Institute (*available at* <http://www.workplacebullying.org/>) found that 37% of workers said they had been bullied on the job; 45% of the victims stated that the stress related to the bullying affected their health, with 33% suffering for more than one year.
 3. Studies also report that employees at small companies are just as likely to experience bullying as employees at larger companies. Wayne A. Hochwarter, a management professor at Florida State University’s College of Business, surveyed 980 works in March and April on workplace bullying. Mr. Hochwarter found that “[o]ne third of respondents said they work for companies with about 100 employees or less, and of those, 23.5% reported experiencing supervisor bullying on a weekly basis, compared with 21.3% of the other two-thirds of respondents who said they work for larger organizations. See Needleman, *supra*.
 4. Currently, “bullying” in the workplace is potentially actionable under federal and state discrimination laws if it involves or is directed at a protected characteristic. As the New York Labor and Employment Law Report reports (*available at* <http://www.nylaborandemploymentlawreport.com/2010/05/articles/harassment/an-eye-on-new-york-workplace-bullying-legislation/>), the New York legislation—characterized a “civility law”—if passed, seemingly would apply to almost any employer, and it would “almost certainly create a new wave of employment litigation against employers, at a time when most employers can least afford it.” As a result, the Report continues, “employers would be wise to ensure they have implemented an appropriate workplace

violence policy.” For example, Rick Gibbs, a senior human-resource specialist for Administaff, Inc., a human-resources-outsourcing firm, advises that employers should create avenues for employees to report instances of abuse (e.g., instituting an anonymous hotline). *See Needleman, supra.*

5. A starting point for devising such a policy could be an OSHA “Fact Sheet” (*available at* http://www.osha.gov/OshDoc/data_General_Facts/factsheet-workplace-violence.pdf) on workplace violence, which details an action plan for employers to promote a violence free workplace. The Fact Sheet further suggests that “[e]mployers who do not take reasonable steps to prevent or abate a recognized violence hazard in the work place can be cited” under the Occupational Safety and Health Act’s “General Duty Clause,” which requires employers to provide a safe and healthy workplace for their covered employees.
6. Take, for example, Road Science, LLC, a “road paving technology company” based in Tulsa, which has adopted a self-proclaimed “Jerk-Free Workplace.” In consult with The People Group, LLC, a Tulsa company specializing in “positive people practices consulting,” Road Science has endeavored to provide its employees a “healthy and safe work environment” devoid of “bullish behavior,” which it deems “unacceptable, because it breaches principles of equality and fairness.” Kevin Kennemer, founder and partner of The People Group, considers of the utmost importance workplace free of bullying, stating, “jerks can be high performers, but create problems. By Road Science adopting an intolerance to bullying, it will prevent harmful workplace issues, and allow the company to provide, undoubtedly, the best work environment in Tulsa.”
7. As of the latest from the Workplace Bullying Institute (*available at* <http://www.healthyworkplacebill.org/states.php>), 17 states have introduced similar legislation since 2003; to date no state has enacted such legislation. In addition to the pending New York legislation discussed above, the Illinois and New Jersey legislatures also have active anti-workplace bullying legislation in the hopper. For the Illinois bill, visit <http://www.healthyworkplacebill.org/states/il/illinois.php>; for the New Jersey bill, visit <http://www.healthyworkplacebill.org/states/nj/newjersey.php>.
8. Court cases are already on the rise regarding appropriate behavior between employers and employees. *Compare Alfano v. Costello*, 294 F.3d 365, 377 (2d Cir. 2001) (“It is [] important in hostile work environment cases to exclude from consideration personnel decisions that lack a linkage or correlation to the claimed ground of discrimination. Otherwise, the federal courts will become a court of personnel appeals.”), *with Raess v. Doescher*, 861 N.E.2d 1216 (Ind. Ct. App. 2007). In *Raess*, the Indiana Supreme Court, over the dissent of one judge, declined to decide whether it was error to admit the testimony of a so-called “bullying expert.” A cardiac surgeon who was accused of being a workplace bully because he yelled at a co-worker, was sued by the co-worker for intentional infliction of emotional distress, and the trial court permitted a so-called “bullying expert” to testify. The court did state as follows: “The phrase ‘workplace bullying,’ like other general terms used to characterize a person’s behavior, is an entirely appropriate consideration in determining the issues before the jury. As 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."

9. An interesting side note: recent press surrounding Supreme Court nominee Elena Kagan has described her as a "yeller," harboring a "temper," and, as the New Workplace Institute has even queried, potentially a "bullying boss." See Denise Lavoie, *Kagan Known for Openness, Assertiveness at Harvard*, AP Legal Affairs Writer, May 20, 2010, available at http://www.salon.com/news/feature/2010/05/20/us_kagan_temperament; *Is Elena Kagan a Bullying Boss?*, Posting of David Yamada to Minding the Workplace: The New Workplace Institute Blog, available at <http://newworkplace.wordpress.com/2010/05/18/is-elena-kagan-a-bullying-boss/> (May 18, 2010, 11:52 EST).

10. Finally, for more information on bullying, see Vicky Oliver, *Bad Bosses, Crazy Coworkers & Other Office Idiots* (Sourcebooks, Inc. 2008); David Yamada, *Workplace Bullying and the Law: Materials for Scholars and Practitioners*, available at <http://www.newworkplaceinstitute.org/docs/nwi.web.bib.bullying&law.1.pdf>; David Yamada, *Potential Legal Protections and Liabilities for Workplace Bullying* (June 2007), available at <http://www.newworkplaceinstitute.org/docs/nwi.web.bullying&law2.pdf>; Tresa Baldas, *States Take Aim by Taming 'Bully Bosses'*, Nat'l L. J., Apr. 9, 2007; BullyBusters.org, *State-By-State Legislative History of the Anti-Bullying Healthy Workplace Bill*, available at <http://www.bullybusters.org/advocacy/pdf-docs/billhistory.pdf> (last visited May 9, 2007); Rebello, *States Weigh Anti-Bullying Laws*, Lawyers USA 3 (March 12, 2007). See also *Workplace bullying*, Wikipedia, last modified on May 26, 2010, available at http://en.wikipedia.org/wiki/Workplace_bullying; Posting by Jon Hyman to the Ohio Employment Law Blog, *Empathy Does Not Require Liability*, <http://ohioemploymentlaw.blogspot.com/2010/06/empathy-does-not-require-liability.html> (June 14, 2010);