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SPECIAL FEATURE

Bullying in the workplace: risks and tips for employers

By William E. Hannum III



Employers should be focused on minimizing the risk of bullying in the workplace. While bullying at schools is getting an enormous amount of attention, there are real legal and practical risks to allowing bullies to

roam the workplace.

Moreover, the increased attention on school bullying, the widespread passage of anti-bullying laws for schools and recent headline-grabbing examples of bullying in the workplace have already led to an increased focus on bullying in general.

In turn, this is likely to lead to changes in the law and in how courts handle other employment claims involving allegations of bullying at work. In order to prevent bullying at work, employers should follow the best practices outlined below.

Bullying at schools has led to numerous suicides in 2010, many of which grabbed headlines and occupied hours of national news programming.

Tragically, the stories follow a decade in which 45 states passed laws expressly prohibiting bullying at school.

In Massachusetts, an anti-bullying law went into effect in May 2010 that requires schools to adopt best practices, including comprehensive preventive measures, anti-bullying policies and plans, and employee training.

William E. Hannum III is managing partner at Schwartz Hannum, a labor and employment firm representing management in Andover, Mass.

Risks outside the school yard

Of course, bullying is not limited to the school yard, and indeed, bullying in the workplace is a real problem.

Earlier this year, an employee of a prominent literary magazine in Charlottesville, Va., committed suicide allegedly because of workplace bullying by his supervisor.

A report summarizing the employer's investigation into the allegations concluded that although there had been no complaints of bullying prior to the suicide, there had been prior reports that the supervisor was "not being courteous or respectful, ... but none ever seemed to rise to the level of a serious, on-going concern."

Certainly, as the report also pointed out, "[i]t is sometimes difficult to define where the line gets crossed between a tough manager and an unreasonable one."

Currently, there are no laws expressly prohibiting workplace bullying despite efforts to pass such laws in the last decade. But even in the absence of laws, there are real legal and practical risks to bullying in the workplace. Victims have sought legal recourse through claims of unlawful harassment based on a protected characteristic (i.e., race, gender, religion, etc.).

An employee who was repeatedly humiliated in front of board members and other employees received a jury award of \$400,000 on her retaliation claim, even though her underlying discrimination claim was denied.

In many cases where some kind of bullying occurred, the employer's defense is the "equal opportunity jerk" argument, in which the manager admits that he (or she) uses foul language and yells at employees. The argu-



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ment is that this abusive behavior is not unlawful because the manager treats everyone in the same abusive manner. This is not the story an employer wants to tell a jury.

Expect claims to remain

Victims of workplace bullying may also pursue other state law claims, such as intentional infliction of emotional distress, assault and battery, tortious interference with business or contractual relations, and the like.

While such claims do not always succeed, employers should expect that juries and judges will be more open to these claims in the future as bullying remains in the news and accepted by the courts.

In 2008, a victim of workplace bullying was awarded a \$325,000 jury verdict. The plaintiff complained that the bully (a surgeon) had told him he would "smack the s--- out of him," said he was "over" and "finished" and "history," and finally charged toward him with a clenched fist, causing the plaintiff to fear for his safety and well-being.

As a result, the plaintiff suffered from depression, insomnia and loss of appetite. He brought suit for claims of assault, inten-

tional infliction of emotional distress and interference with employment relationship, and was successful in demonstrating that the defendant committed an actionable assault.

Employers have been held liable for workplace bullying under claims of unlawful retaliation, anti-discrimination statutes and state law, a fact that should serve as a wake-up call to employers.

Even in the absence of specific anti-bullying laws, there is potential liability for workplace bullying.

Real costs

There are real personal and practical costs to allowing bullying in the workplace. A 2010 survey by the Workplace Bullying Institute found that 35 percent of American employees — approximately 54 million employees — have experienced bullying firsthand, a figure four times greater than those for illegal harassment.

Another survey found that 45 percent of employees who have been bullied in the workplace suffered from stress-related health problems such as anxiety, depression, post-traumatic stress disorder attributable to bullying, which contributes to increased employee absenteeism and added health care costs for employers.

Approximately 40 percent of bullied employees voluntarily separate from their employment in direct response to ongoing workplace bullying, which results in increased employee recruitment and training costs for employers.

Given these significant costs, workplace bullying is an issue employers would be wise to focus on preventing right now.

Though unsuccessful, there have been a number of attempts in recent years to pass laws that prohibit workplace bullying.

Nineteen states, including Massachusetts, New Hampshire, and New York have attempted to pass such laws since 2003.

One version, called the Healthy Workplace Bill, seeks to make it an unlawful employment practice to subject an employee to an abusive work environment, regardless of the employee's protected class status. An "abusive work environment" is generally defined as an environment in which an employee is subjected to abusive conduct so severe that it causes tangible harm to the employee.

In Massachusetts, a version of the bill was under consideration in early 2010, while in New York, the state Senate passed a version of the law that would have established a civil cause of action for employees subjected to an abusive work environment. That bill, however, was placed on hold and is now slated for further action in 2011.

Actively prevent workplace bullying

To reduce the growing risks associated with workplace bullying, employers should adopt a general anti-bullying program, including policies, plans and training.

Pursuant to school anti-bullying laws, many state departments of education disseminate excellent model policies and plans for schools to use in compliance with these laws. They can serve as a great starting point for an employer seeking to implement a workplace anti-bullying program.

The plans borrow concepts familiar to sexual harassment prevention programs, but prohibit all forms of bullying regardless of whether or not the behavior is based on the employee-target's legally-protected characteristic(s).

A well-drafted anti-bullying policy should both define and prohibit bullying as well as

provide employees with internal channels to seek recourse and assert legitimate complaints of bullying. They should also provide clear procedures for prompt investigation and response.

Employers who provide an internal complaint process to address workplace bullying concerns and clear guidance on its investigatory procedure will not only increase the number of employment-related matters that it may resolve without judicial involvement, but also afford itself the ability to unilaterally control any necessary investigations and disciplinary actions associated with such bullying.

As part of any program, employers should also provide managers and employees with training on identifying and preventing workplace bullying. Such training should focus on the appropriate methods for addressing complaints, as well as potential personal and professional consequences of engaging in workplace bullying.

Programs that subject employees to disciplinary action for engaging in bullying behavior should minimize the risks of bullying to employers. They also have the potential to foster a positive work environment, which may lead to increased employee satisfaction and increased productivity.

Until new laws are passed that expressly prohibit workplace bullying, employers should expect that employees, courts and juries will find ways to work around that void, especially as news reports continue to follow allegations and the tragic results of bullying.

Accordingly, employers should implement an anti-bullying program to reduce the significant legal, practical, and personal risks associated with bullying at work. **NEIH**