Dealing with the Bully in the Workplace: New Ideas, Best Practices

October 16-17, 2014

2014 Wisconsin SHRM Conference

Agenda

1) The State of Bullying
2) Where Does Bullying Cross with Labor and Employment Laws?
3) How can Employers Legally and Effectively Manage Bullying in the Workplace?
4) Scenarios

What is Workplace Bullying?

• No legal definition in the United States

• Tennessee is the only state to have enacted a workplace bullying law, which applies exclusively to public-sector employers.

• Thus, individual employers not subject to Tennessee law must determine what conduct will be tolerated in the workplace.
Workplace bullying may include:

- Screaming at colleagues
- Insults and practical jokes
- Physical intimidation
- Constant and harsh criticisms
- Spreading rumors
- Purposefully sabotaging an employee’s work
- Isolating another employee or “freezing them out”
- Treatment after a change in the employee’s circumstances
- Encouraging others to turn on the bullied target
- Accidental bullying – where the bully does not understand his/her actions is negatively affecting others

Healthy Workplace Bill
Defines Bullying

Workplace Bullying is repeated, health-harming mistreatment of one or more persons (the targets) by one or more perpetrators.

It is abusive conduct that is:

i. Threatening, humiliating, or intimidating; or

ii. Work interference — sabotage — which prevents work from getting done; or

iii. Verbal abuse.

The State of Bullying
Bullying Statistics

Once a person becomes the target of bullying, in 61% of cases, the bullying ends only as a result of the bullied employee losing or leaving his/her job.

- 65.6 million workers in the United States are affected by bullying
- 27% of Americans have suffered abusive conduct at work

Workplace Bullying Institute's 2014 U.S. Workplace Bullying Survey

Who is more likely to be a target of bullying?

Females 60%
Males 40%

Minorities

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<th>Race</th>
<th>Were Bullied</th>
<th>Witnessed Bullying</th>
<th>Total % affected</th>
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<td>32.5%</td>
<td>24.4%</td>
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<td>Asian-American</td>
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<td>19.4%</td>
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<tr>
<td>White</td>
<td>24.1%</td>
<td>20.3%</td>
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</table>

Workplace Bullying Institute's 2014 U.S. Workplace Bullying Survey
Bullying Statistics

Who is more likely to be the bully?

**Males**

69%

**Females**

31%

Workplace Bullying Institute's 2014 U.S. Workplace Bullying Survey

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Bullying Statistics

Who is more likely to be the bully?

**Individual Perpetrator - 66.2% of cases**

- 40.1% are higher ranked individuals, a boss
- 19.0% are same ranked individuals, a peer
- 7.1% are lower ranked individuals, a subordinate

Workplace Bullying Institute's 2014 U.S. Workplace Bullying Survey

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Bullying Statistics

Who is more likely to be the bully?

**Multiple Perpetrators – 33.8% of cases**

- It is not uncommon for other bullies to join a main instigator.
- This concept is called “mobbing.”

Workplace Bullying Institute’s 2014 U.S. Workplace Bullying Survey
Current State of Laws

• The Healthy Workplace Bill
  - Initiative of the Workplace Bullying Institute, first introduced in California in 2003
  - Provides employees protection from “abusive work environments” and legal redress for victims
  - Requires employers to prevent future bullying
  - Protects employers from vicarious liability if proper internal mechanisms are put in place
  - 28 legislatures (26 States, 2 Territories) have introduced the Bill
  - Currently 23 bills are active in 15 states
  - Tennessee is the only state to have enacted a version of the Bill into law (applies to public sector employment only)

• Tennessee Healthy Workplace Act
  - Signed into law on May 22, 2014 by Gov. Bill Haslam
  - Only state with workplace bullying legislation
  - Defines abusive conduct in the workplace
  - Law is limited as it only provides public-sector employers immunity from lawsuits if they adopt workplace anti-bullying policies that comply with the law
  - Will likely serve as a model for future legislation

Miami Dolphins

• Team member Jonathan Martin left the Miami Dolphins after being the target of bullying by a co-teammate and fellow offensive lineman, Richie Incognito.
• Situation was investigated by Ted Wells, a NY attorney hired by the NFL to conduct an internal investigation
Miami Dolphins

- Wells released a 144 page report detailing the multiple instances of bullying (racial slurs, homophobic comments, physical intimidation, etc.)
- Team had clear, written policy against harassment and discrimination
- Coaches were fired, Incognito suspended, other players lack of punishment
- Implications of case on future of workplace bullying

What are companies doing?

- 2014 Workplace Bullying Survey shows that employers fail to appropriately respond to reports of abusive conduct
  - Only 28% of employees responded to survey that their employers had acted positively to abusive conduct
  - With the increased attention on workplace bullying, employers need to pay more attention on how they will correct and deter instances of bullying

The Intersection of Workplace Bullying and Labor & Employment Laws
National Labor Relations Act

Section 7 of the NLRA:
"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

Section 8 of the NLRA:
It is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

The scope of bullying far exceeds the protections of anti-discrimination and anti-harassment laws.

Anti-Discrimination/Anti-Harassment Laws
• Title VII of Civil Rights Act of 1964
• Age Discrimination in Employment Act of 1967
• American with Disabilities Act of 1990
• Equal Pay Act of 1963
• Sexual Harassment
• OSHA
Common Law Claims

- Individuals can present tort law claims in state or local courts
- Intentional Infliction of Emotional Distress
- Claims against employers
  - Negligent Hiring
  - Negligent Referral
  - Negligent Supervision or Retention

Best Practices

What should you do?

Costs of Bullying

Financial Costs

- Decreased productivity and motivation
- Medical and insurance costs
- Increased turnover
- Losing skilled employees
- Possible litigation or settlement expenses
Costs of Bullying

Public Costs

• Inability to keep good employees
• Harm to company’s reputation
• Loss of positive public image may lead to boycotts by consumers

Take Proactive Steps

• Act now, not later!
• Add written anti-bullying policy in addition to or separate from anti-harassment policy
  – See Sample Policy (attached to materials)
  – Conform with NLRA Section 7 and 8
  – Do not prohibit activity that relate to terms and conditions of employment
• Add social media policy
  – Also must comply with NLRA

Take Proactive Steps!

• Conduct training for all employers
  – Human Resources office employees need to be able to address and correct any instances of bullying
  – Managers and supervisors must be able to recognize bullying
  – Employees need to know what conduct will not be tolerated in the workplace
  • Distribute and explain employee handbook to all employees
Take Proactive Steps!

• Educate employees on the adverse impact bullying has on other employees and the employer itself
• Encourage employees to come forward with any accounts of witnessing bullying
  – 2014 Workplace Bullying survey found that in 49% of bullying cases witnesses took negative actions instead of coming forward to their employers
• Inform employees no negative consequences will occur for reporting bullying

Take Proactive Steps!

• Provide information about support groups and other outside organizations to employees
• Implement policy to keep records of reported incidents of bullying
• Accept responsibility and act promptly after bullying has been reported
• Act now, not later!

Scenario A – Supervisor

Jane, an employee at XYZ, Inc., has struggled with weight her entire life and continues to battle an eating disorder. At work, Jane is frequently overheard telling other employees what they should and should not eat. Jane usually focuses her attention on Robert, one of her peers who started working a few months after Jane.

One day, you overhear Jane telling Robert if he keeps eating chips every day he will "become even more fat and no woman will ever be attracted to him." Robert does not seem to acknowledge Jane but you can tell by his face he is not too pleased about the comment. Jane walks away and you overhear her telling Nancy, her friend at work, that Robert is getting very fat and that Nancy should say something to Robert. Jane continues to make rude comments about Robert, loud enough for other coworkers to hear and still with Robert in the room. Your employer does not have a specific anti-bullying policy in place.

What action do you take? Does Jane need to be disciplined?
Scenario B – Employee

Kevin and Doug are best friends who have worked at ABC International Cooking, Inc. for five years. Kevin and Doug are known as the company’s jokesters. Luke just started working at the company about three months ago. Luke is a shy guy who mostly keeps to himself. Unknown to anyone at the company, Luke has struggled with depression before, but has enjoyed working at his new job.

Kevin and Doug decide that Luke is going to be the new target of their pranks, which they consider to be lighthearted. They send Luke a dozen of roses signed as secret admirer. Luke enjoys the flowers and shares the news with the office crew; however, the office members laugh at him because they were informed of the prank by Kevin and Doug. Kevin and Doug get other members of the office crew to join in on other pranks. Any time Luke sends material to the printer, Karen, a woman sitting in the office next door, grabs the copies before Luke can get to them.

Kevin and Doug ask you to help them with a prank. They want you to type a letter to Luke, posing as his boss that informs him he has been terminated and should leave the office immediately. What action do you take?

Scenario C – HR

The previous incident has been reported to you.

Your company has a written anti-bullying policy and Luke does not fit within any protected classes. What action do you take?

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Thank You