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Workplace Bullying and the Future of the “Equal Opportunity Harasser”

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Everyone is familiar with the “mean” boss: a chef who yells at the line cooks in the middle of a busy rush, a manager who becomes angry when a deadline is not met, and a boss who criticizes a poor performer in front of other workers. There historically has been a legal distinction between a “hostile working environment” and mere hostility at work. The courts have ruled that anti-discrimination laws are not a “civility code.” Judicial opinions frequently say the law does not guarantee a utopian working environment, free from stress and conflict.

On the other hand, managers are not permitted to single out employees for hostile treatment on the basis of protected status. A manager who calls all employees “jerks” at a meeting is not violating anti-discrimination laws. But a boss who refers to males as “jerks” and females as “bitches” may contribute to a hostile work environment.

New judicial opinions, legislative proposals and commentary suggest the line between unpleasant and legally actionable conduct is blurring. State governments and courts may be ready to implement legal protections against conduct that amounts to “bullying” in the workplace, even without an obvious link to protected status.

Current Anti-Discrimination Laws Protect Against Harassment Based on Protected Criteria

Many employers and employees misunderstand the legal protections against “harassment” and a “hostile work environment.” Not all “hostile” conduct creates a hostile working environment in the legal sense. The conduct must be “severe” or “pervasive” – so

much so that it alters the terms and conditions of a “reasonable victim’s” work environment. Not every insult, off-color joke, or gesture creates liability for “harassment.” It is the accumulation of such conduct over time that becomes an actionable hostile working environment. That is one reason why employers should proactively prevent and stop such conduct before it gives rise to a claim.

The “harassment” also must be directed at the victim because of his or her membership in a protected group. The U.S. Supreme Court in *Oncale v. Sundowner Offshore Serv., Inc.* explained that male-on-male sexual harassment is actionable as long as the conduct occurred because of the victim’s sex. A male employee part of an oil platform crew claimed to have been subjected to humiliating sex-related actions against him by male co-workers in violation of Title VII’s discrimination provisions. The key issue for the Court was “whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.” The Court reiterated, however, that Title VII is not a civility code and does not prohibit all verbal or physical harassment in the workplace.

The Demise of the “Equal Opportunity Harasser” Argument

Given the requirement that harassment be “based on” protected criteria, it follows that a manager who is unpleasant, surly, or even rude to all employees equally ordinarily does not violate current anti-discrimination laws. That is because “harassment” is a form of discrimination. In fact, Title VII of the Civil Rights Act of 1964 does not even mention

the word “harassment.” Employees claiming “harassment” therefore must establish that the manager’s treatment was unfavorable to or singled out a protected group, such as race, sex, age, religion, or disability. The same standard applies in California, although California law recognizes more protected groups than federal law, such as sexual orientation and gender identity.

The boss who is generally critical or rude to all in equal measure has been dubbed in certain circles the “equal opportunity harasser,” shorthand for saying the same conduct is doled out without regard to protected status. Because the U.S. Supreme Court and courts in California have said that the anti-discrimination laws are not “civility codes,” plaintiffs complaining about “equal opportunity harassers” typically have been denied relief.

Even under current law, the “equal opportunity harasser” argument is limited to special facts. For example, in *Steiner v. Showboat Operating Co.*, the Ninth Circuit Court of Appeals rejected Showboat’s argument that a manager “consistently abused men and women alike.” Steiner was a female employee who worked as a Blackjack dealer at Showboat Hotel and Casino. She later was promoted to be the casino’s first female floorperson. When Steiner complained that her supervisor was calling her offensive names based on her sex, she was moved to a different shift, while the supervisor escaped reprimand altogether. Steiner preferred her previous shift and after about a month, moved back to her old position. However, the supervisor continued to call her offensive names in front of customers and other employees.

Defending against Steiner's lawsuit for sexual harassment, Showboat argued that because the supervisor mistreated both males and females, his harassment was not sex-based. The Court disagreed, reasoning that though the supervisor was abusive to men, his abuse of women could be distinguished because it relied on sexual epithets, offensive and explicit references to women's bodies, and sexual conduct. Unlike his abuse of men, the supervisor's abuse toward the female employees "centered on the fact that they were females." The Court said "[i]t is one thing to call a woman "worthless," and another to call her a "worthless broad."

The court's distinction between "worthless" and "worthless broad" is easy to understand: one is neutral (and lawful) and one is based on sex (and is evidence of a violation of Title VII). Therefore, even after *Steiner*, the "equal opportunity harasser" argument could still be made if the conduct was truly equal. In a more recent case, though, the Ninth Circuit took step closer to outlawing boorish conduct regardless of whether it is equally meted out.

In *EEOC v. National Education Association*, the Court ruled that inappropriate conduct that is not sex-based may subject an employer to liability for sex discrimination if the employee's conduct affects men and women differently. Three female employees and the EEOC filed a claim against the National Education Association (NEA) for sex-based hostile work environment in violation of Title VII.

The employees worked under a supervisor who routinely acted abusively toward his employees, including shouting, screaming, foul language, invading employee's personal space and threatening physical gestures. The District Court found that the supervisor's conduct was not sex-based because the supervisor never made lewd comments, referred to women employees in gender-specific terms, or imposed gender-specific requirements upon women employees. The supervisor treated male and female employees similarly.

Although the Court of Appeals agreed there had been no overtly sex-based conduct, the Court held that hostile acts do not need to be overtly sex- or gender-specific. Evidence about how the harasser treated members of both sexes may be used to show one sex's terms or conditions of employment is more disadvantageously affected. The ultimate question was whether the behavior affected women more adversely than men. Therefore, the *NEA* decision effectively has eliminated the "equal opportunity harasser" defense.

The Next Step: Outlawing "Workplace Bullying"

The Ninth Circuit's *NEA* decision highlights significant tension between anti-discrimination laws and the "equal opportunity harasser" argument. To find a violation of Title VII, the Court was required to find the conduct was based on sex. Without any evidence of differential treatment, the Court instead determined that the effects of conduct on protected groups are a substitute for whether the conduct was directed at the protected status of the victim.

To avoid arguments over the link between conduct and protected status, employees' rights groups and state legislators are taking the issue of harassment outside of the traditional context of anti-discrimination laws. In 2003, for example, the California legislature introduced Assembly Bill 1582. This bill would have provided legal recourse to employees who suffered from workplace bullying or otherwise endured an abusive work environment without regard to whether the conduct was based on protected status. The bill, however, died in committee in 2004.

More recently, proposed laws outlawing bullying are gaining traction. This year, Oregon is considering Senate Bill 1035, which would allow a complainant to bring a civil suit for workplace bullying. A similar bill died without a hearing in 2005, but Senate Bill 1035 has been granted hearings this year. Similar bills have been introduced in 12 states, but none thus far have been enacted. The only

law in Northern America to address workplace bullying is currently in Quebec.

Advocates point to statistics purporting to show most employees are fed up with workplace bullying. One nationwide survey conducted by the Employment Law Alliance revealed that 44% of American workers have worked for a supervisor or employer who they consider abusive. More than one-half of American workers have experienced or heard about supervisors/employers behaving abusively by making sarcastic jokes/teasing remarks, rudely interrupting, publicly criticizing, giving dirty looks to or yelling at subordinates or ignoring them as if they were invisible.

Sixty-four percent of American workers think an employee who has been abused by a supervisor or employer should have the right to sue that supervisor and their employer to recover damages. Another study conducted by the Workplace Bullying Institute concluded that 71% of bullies are bosses, and 80% of the women and 20% of the men surveyed believed they had been bullied in the workplace.

Recommendations

Is the world ready for a law that requires managers to be "pleasant?" How will managers be able to criticize performance, demand higher productivity, or express frustration or anger without facing potential legal liability? Will the law protect employers against false or trivial charges? Will employers be able to sue their employees for being disagreeable or insubordinate? It is too early to provide the answers to these questions. But employers should take measures now to limit liability for a hostile environment, whether or not the conduct is based on sex or other protected criteria, including:

- Ensure employees and managers understand that the employer expects all employees, including managers, to be treated with respect.
- Develop anti-harassment policies or a code of conduct to address behavior frequently interpreted as bullying, including threaten-

ing, intimidating or humiliating speech or conduct.

- When training about hostile work environment harassment, include discussion of inappropriate conduct that is unacceptable regardless of the victim's protected status.
- Treat complaints about bullying seriously and conduct a proper investigation to determine if the complaint involves violation of employer policies against such conduct.
- Do not dismiss allegations of bullying conduct merely because there is no evidence of an "EEO" issue.
- Consider training managers how to motivate, discipline, and coach employees without resorting to aggressive or hostile conduct.
- Protect employees who complain about bullying from retaliation.

Measures such as these will go a long way to prevent claims under current anti-discrimination laws and any reasonable "anti-bullying" measure that is enacted in the future.

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