WORKPLACE BULLYING AND EMPLOYMENT LAW

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Presented at
Workplace Bullying:
Current Law, Proposed Legislation, and Practical Strategies in the Interim
Massachusetts Bar Association, Luncheon Roundtable
Wednesday, June 17, 2009

Disclaimer: This material is provided for informational purposes only and is not intended as a substitute for legal advice.

I. Potential Legal Claims and Liabilities

A. Tort Liabilities

1. Workers' Compensation Exclusivity Bar

- The Massachusetts workers' compensation law (M.G.L. Ch. 152, Secs. 23 et seq.) bars common law claims against an employer for negligence, assault, battery, intentional infliction of emotional distress, and negligent infliction of emotional distress. Doe v. Purity Supreme, Inc., 422 Mass. 563 (1996).

- Workers' comp does not bar action against employer for false imprisonment. Doe v. Purity Supreme, Inc., 422 Mass. 563 (1996).

- Workers' comp does not bar actions against employers for defamation, malicious prosecution, violation of civil rights, or loss of consortium. Foley v. Polaroid Corp., 413 N.E. 2d 711 (1980).

- Workers' comp exclusivity does not immunize co-employees from liability for tortious acts committed outside the scope of employment that are unrelated to the employer's interests. See Brown v. Nutter, McClennen & Fish, 696 N.E.2d 953 (Mass.App.Ct. 1998).

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2. Intentional Infliction of Emotional Distress (vs. Individual Employee)

- This tort requires intentional, extreme, and outrageous conduct that causes severe harm to the plaintiff. Agis v. Howard Johnson Co., 355 N.E. 2d (Mass. 1976).

- Brown v. Nutter, McClennen & Fish is relevant here because the plaintiff, a legal secretary, alleged bullying-type treatment by a law firm partner.

1995-98 Study of Workplace-Related IIED Claims in State Courts

I conducted an extensive survey and analysis of state case law involving workplace-related IIED claims with bullying-type fact patterns, concentrating on the period 1995-98. These were my main conclusions:

- Typical workplace bullying, especially conduct unrelated to sexual harassment or other forms of status-based discrimination, seldom results in liability for IIED. In many instances, trial courts granted defense motions for dismissal or summary judgment, and the appellate courts affirmed.
- The most frequent reason given by courts for rejecting workplace-related IIED claims was that the complained-of behavior was not sufficiently extreme and outrageous to meet the requirements of the tort.
- Plaintiffs also can lose their IIED claims because they did not establish the requisite level of severe emotional distress.
- Although typical workplace bullying alone, even with severe underlying conduct, usually does not result in IIED liability, the presence of an aggravating factor may rescue what otherwise is likely to be an unsuccessful claim.
- The most successful types of workplace-related IIED claims are those grounded in allegations of severe status-based harassment or discrimination.
- However, it is important to note that many IIED claims based upon allegations of harassment or discrimination are dismissed, even where accompanying statutory claims based on the same facts are upheld.
- When abusive behavior appears to be motivated by a desire to retaliate against an employee who has reported illegalities or irregularities, a court may find that it constitutes extreme and outrageous conduct.

For complete findings, including case summaries, see David C. Yamada, The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection, 88 GEORGETOWN LAW JOURNAL 475 (2000).

3. Intentional Interference with the Employment Relationship (vs. Individual Employee)

In Shea v. Emmanuel College, 425 Mass. 761 (1997), the SJC defined the elements of intentional interference with the employment relationship:

1. The plaintiff had an employment contract with an employer;
2. A third party knowingly induced the employer to break that contract;
3. The third party's interference was both intentional and improper in motive or means; and,
4. The plaintiff was harmed by the third party's actions.

The "Forgotten" Piece of O'Brien v. New England T&T

In Massachusetts, a co-employee may be the third party charged with interfering with the employment relationship, and bullying may constitute actionable behavior under this cause of action. See e.g., O'Brien v. New England Telephone & Telegraph Co., 422 Mass. 686 (1996) (holding that a supervisor could be liable for engaging in a course of abusive conduct towards the plaintiff that was unrelated to the company's corporate interests).

The facts of O'Brien suggest that the supervisor was engaging in a severe, ongoing bullying campaign against the plaintiff: The SJC found that "screaming at an employee repeatedly to humiliate her in front of other employees, calling her names, and denying her work to do when work is available could be found both to exceed the protected conduct of a supervisor and to constitute malicious conduct unrelated to an employer's legitimate business interests." Id. at 690.

No Employer Liability(?)

The "usual rule" has been that IIER "by a supervisory employee will not be imputed to the employer." Clement v. Rev-Lyn Contracting Co., 663 N.E.2d 1235, 1236 (Mass.App.Ct. 1996).

However, is this rule ripe for a challenge?

- The case law establishing this rule originated before the U.S. Supreme Court's decision in Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998), in which the court imposed strict liability on employers for sexual harassment committed by supervisors. The Court conceded that a supervisor engaging in sexual harassment was acting outside of the scope of employment, thus breaking the traditional master-servant agency relationship regarding that behavior. However, the Court imposed liability invoking a different agency standard, holding that the supervisor "was aided in accomplishing the tort by the existence of the agency relation." Id. at 758-59.
- In Gram v. Liberty Mut. Ins. Co., 384 Mass. 659, 663 n.3 (1981), the SJC hinted that an employer could be found liable for IIER if the supervisor acted within the scope of

employment. This suggests that basic agency principles will be applied, opening the door to the "by the existence of the agency relation" standard as used in Ellerth.

4. Other Potential Tort Claims

- Assault (co-employee only)
- Battery (co-employee only)
- False Imprisonment
- Defamation

B. Discrimination Claims

1. Discriminatory Harassment

- Bullying that is grounded in a target's membership in a protected class is actionable under both federal and state discrimination statutes. For example, in Lule Said v. Northeast Security, 2000 WL 33665354 (MCAD 2000), the Massachusetts Commission Against Discrimination took "judicial notice of the emerging body of law relative to 'workplace bullying'" in awarding damages to an employee who endured severe religious harassment because he practiced Islam.

- In hostile work environment claims, several federal circuits have indicated a greater willingness to consider evidence of non-sexual forms of harassment that may be driven by gender animus. See Gregory v. Daly, 243 F.3d 687, 695 (2d Cir. 2001); Durham Life Ins. Co. v. Evans, 166 F.3d 139, 149 (3d Cir. 1999); Mendoza v. Borden, Inc., 195 F.3d 1238, 1275 (11th Cir. 1999); Butler v. Ysleta Independent School Dist., 161 F.3d 263, 267 (5th Cir. 1998). This opens up possibilities for raising bullying-type claims under hostile work environment doctrine.

2. Disability Discrimination

Disability discrimination statutes may offer some relief when abusive behavior has induced or exacerbated a recognized mental disability, but it is not an easy road to recovery. Research by Massachusetts civil rights attorney and former law professor Susan Stefan has demonstrated that claims under the Americans with Disabilities Act by employees involving psychiatric disabilities tend to fit into one of four common profiles:

1. Employees who had worked satisfactorily for an extended period of time until the appointment of a new supervisor and whose claims clearly arose from escalating interpersonal difficulties with their supervisors.

2. Employees whose psychiatric disabilities arose from other work environment issues, including women who were sexually harassed; individuals subjected to hostile work environments as a result of disability, gender, race, or sexual

preference; whistleblowers; and people whose disabilities were related to other claims of employer abuse or unfair treatment.

3. Employees whose disabilities were related to increasing stress, increased hours on the job, or the demands of new positions or new responsibilities. . . .

4. Employees disciplined for misconduct, usually sexual harassment, who claimed that their behavior resulted from a mental disability or that being disciplined showed that their employer perceived them as being mentally disabled.

Susan Stefan, "You'd Have to Be Crazy to Work Here": Worker Stress, The Abusive Workplace, and Title I of the ADA, 31 LOYOLA LOS ANGELES LAW REVIEW 795, 797-98 (1998). However, Stefan concluded that many employees "are losing their ADA cases because abuse and stress are seen as simply intrinsic to employment, as invisible and inseparable from conditions of employment as sexual harassment was twenty years ago." Id. at 844.

3. Retaliation Claims

In Burlington Northern & Santa Fe Railway Co. v. White (S.Ct. 2006), the Supreme Court held that in order to prevail in a retaliation claim under Title VII,

> a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, "which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" (slip op. at 13, citations omitted)

Under this standard, *severe* workplace bullying may constitute actionable adverse action. Low-level bullying does not, falling more within what the Court referred to as non-actionable petty slights, minor annoyances, and snubbing.

C. Employer Policies

Adding bullying to an employee handbook may be useful from an employment relations standpoint but can create contractually enforceable protections and obligations. See O'Brien v. New England Telephone & Telegraph Co., 422 Mass. 686 (1996) (holding that personnel manual can create contractual obligations for employer).

- Some employers are expressly including workplace bullying as prohibited behavior in their employee handbooks and policies.

- Some employers have "quietly" included bullying by referring to generic harassment, including but not limited to harassment on the basis of protected-class status.

D. Labor and Collective Bargaining Statutes

1. Concerted Activity

Union and non-union employees alike may be able to invoke the concerted activity provisions of the National Labor Relations Act and the Massachusetts Public Employee Collective Bargaining Law, which grant covered employees the right to engage in concerted activity for mutual aid and protection. Potentially, a group of non-union employees concerned about workplace bullying could approach their employer pursuant to these protections.

2. Collective Bargaining Provision

In 2009, Massachusetts public employee unions affiliated with the Service Employees International Union (SEIU) and the National Association of Government Employees (NAGE) successfully negotiated a new collective bargaining agreement covering over 21,000 state workers that includes protections against workplace bullying and abusive supervision. The new agreement is effective July 1, 2009 and runs for three years.

Dubbed the "mutual respect" provision in the new contract, it is believed to be one of the first major American collective bargaining agreements to include express protections against bullying at work. Here is an excerpt of the provision:

> The Commonwealth and the Union agree that mutual respect between and among managers, employees, co-workers and supervisors is integral to the efficient conduct of the Commonwealth's business. Behaviors that contribute to a hostile, humiliating or intimidating work environment, including abusive language or behavior, are unacceptable and will not be tolerated.

An alleged violation of the provision may be grieved, but it may not proceed to arbitration. The new CBA covers SEIU Locals 509 and 888 and NAGE Units 1, 3, and 6. SEIU's Kevin Preston, coordinated the collective bargaining efforts for the unions, and to SEIU/NAGE's Greg Sorozan introduced the idea of a provision covering workplace bullying and led negotiations for the NAGE bargaining units.

E. Occupational Safety and Health Laws

Neither federal nor state occupational safety and health laws apply directly to workplace bullying. The primary legislative intent behind these statutes was the prevention of physical injuries, especially those occurring in the industrial sector, and this focus continues to the present day. In recent years, the National Institute for Occupational Safety and Health has been taking much greater interest in workplace bullying and its relation to workplace violence. In February 2005, NIOSH hosted an international roundtable discussion of experts on workplace bullying and psychological aggression at its Cincinnati office.

D. International Legal Responses to Workplace Bullying

The Healthy Workplace Bill has not been formulated in a vacuum. Around the world there is a growing conviction that national and local legal systems should respond to the harm caused by workplace bullying. Australia, Canada, France, Sweden, and the United Kingdom are among the nations that have adopted or are considering the adoption of legal and regulatory responses to bullying. In some of these countries, references to workplace bullying can be found in judicial and administrative decisions. In addition, the International Labor Organization and the European Union have acknowledged that bullying is a serious workplace problem.

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Helpful Sources

New Workplace Institute Programs

The New Workplace Institute is a research and education center that promotes healthy, productive, and socially responsible workplaces. We sponsor several programs a year on workplace bullying and other employment relations topics. To be added to the e-mail list, please send an e-mail to Andrea Shannon at ashannon@suffolk.edu, with "Add to NWI Mailing List" in the subject line.

Minding the Workplace Blog

Since December I have hosted a blog for the New Workplace Institute, "Minding the Workplace," devoted to work and employment relations. Please visit the blog at:
http://newworkplace.wordpress.com

My Articles about Workplace Bullying

For freely downloadable copies of my longer articles about workplace bullying, please go to:
http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=506047

Recommended Book and Website

Gary Namie, Ph.D. & Ruth Namie, Ph.D., The Bully at Work (Sourcebooks, 2nd ed., 2009).

The Namies are founders of the pioneering Workplace Bullying Institute:
http://www.workplacebullying.org