

argument regarding schedule issues, in which the doctor yelled at the plaintiff and physically intimidated him.⁵⁹ The trial court allowed the plaintiff to present expert testimony that the argument was an episode of workplace bullying, and the doctor was a workplace bully.⁶⁰ Although the jury found for the doctor on the intentional infliction of emotional distress claim, it awarded damages to plaintiff on the assault claim.

On appeal, the court considered whether it was reversible error to allow a witness to label the doctor as a workplace bully. In reversing and remanding, the court stated the expert's testimony "allowed the jury to infer that [the doctor] committed assault because that is what 'bullies' do," and held that the probative value of that testimony was substantially outweighed by the danger of unfair prejudice.⁶¹

Americans With Disabilities Act and Workers' Compensation Laws

Employees who do not get along with their supervisors have also attempted to use the Americans With Disabilities Act (ADA)⁶² and workers' compensation laws to support a claim that an alleged

bully created stress and anxiety requiring accommodation and/or compensation. For example, in *Weiler v. Household Finance Corporation*, plaintiff requested accommodation under the ADA after her supervisor allegedly "raised his voice, lunged across the table, and made her very uncomfortable with his tone of voice and sarcasm" during her annual performance review.⁶³ Plaintiff claimed that once she told her employer that her supervisor was causing her stress and anxiety, the employer had a duty to transfer either her or the supervisor in order to alleviate her problems. Plaintiff also claimed she could have returned to work under a different supervisor. The court rejected these claims, finding that plaintiff did not have a recognized disability.⁶⁴

Under California workers' compensation law, an employee who can demonstrate that workplace bullying has caused a psychiatric injury may be entitled to compensation. Labor Code section 3208.3(b)(1) provides that a claimant may receive compensation for a psychiatric injury if she can "demonstrate that 'actual events of employment' were the 'predominant' cause of the alleged psy-

chiatric injury."⁶⁵ The statute was amended in 1993 to require claimants "to establish objective evidence of harassment, persecution, or other such basis for alleged psychiatric injury."⁶⁶ Claims for psychiatric injury are "evaluated strictly" "in order to 'limit claims for psychiatric benefits due to their proliferation and their potential for fraud and abuse.'"⁶⁷

Retaliation

Exercising protected rights under Title VII, the FEHA, federal and state labor laws, workers' compensation laws and other federal and state laws may form the basis of a retaliation claim. Even where an employee's claim of harassment or discrimination based on bullying behavior fails, an employer that retaliates against an employee whose underlying complaint cannot be legally proven can still be held liable for retaliation.⁶⁸ An employee need only to show a causal connection between the protected activity—making a complaint or supporting a complaint of harassment, actionable or not—and an adverse employment action.⁶⁹ A charge of retaliation may be used to resuscitate claims of bullying that

Practical Ways to Deal With Workplace Bullies

By Patricia C. Perez, Esq., SPHR



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Whether or not states enact laws prohibiting workplace bullying, this very real and prevalent issue is one that all employees and employers should consider. The consequences of workplace bullying—both the emotional effects on the bullied employee and the economic implications to companies—are too high to ignore. Perhaps more than any other aspect of relationships at work, employers should be less concerned here with their legal requirements, and more with how dealing with these claims is good for employees and business.

There are at least two sets of issues that may arise when an employer has a workplace bully in its ranks. The first is related to the bully; the second is the effect that the

bully has on co-workers. Regardless of the details, dealing with the situation swiftly, fairly and consistently is the key.

ADVICE FOR DEALING WITH THE BULLY

Although it would be impossible to analyze all of the psychological issues associated with bullying behavior, it is clear that bullies are adept at either covering up their behavior (by doing their damage behind the target's back or in other sneaky ways) or at cloaking their behavior behind dishonest excuses. Regardless of how bullies try to cover up or excuse their behavior, it is critical for employers to deal with this behavior, not only for the good of the company and the bullies' co-workers, but

also for the good of the bullies themselves. So, what is an employer to do when faced with bullying behavior?

- **First and foremost, deal with the problem.** All too often, companies (or more accurately, managers at companies) simply fail to act—whether out of fear (human nature being what it is, we usually avoid conflict), wishful thinking that the behavior will simply stop on its own if ignored, a feeling that this is not "her problem," or, more often than not, just plain lack of courage to do the right thing.
- **Do not reward the behavior.** Another common reason managers fail to act is their belief that action on their part will

may not have been actionable as claims of hostile work environment or other discriminatory harassment.⁷⁰

CONCLUSION AND RECOMMENDATIONS

While a general law of civility in the workplace has not been passed in California, a national dialogue regarding appropriate workplace behavior continues to evolve. Because nearly everyone can fall within some protected status, and there are various means of redress for bullied employees under existing law, the best approach for an employer with a bully in the workplace is to treat him or her as a harasser. Complaints of a hostile workplace based on bullying behavior should be immediately addressed through a thorough and impartial investigation and prompt corrective action. Employers should also include harassment prevention as part of their AB 1825 sexual harassment training.⁷¹ By taking these steps, employers will go a long way toward eliminating behavior that can potentially create liability under the law, as well as creating a more productive and civilized work environment. ⁴²

ENDNOTES

1. The authors would like to thank Hollis Emery and Lisa Herzog for their contributions to this article. Lisa Herzog has her own practice in the areas of employment and business litigation. Her office is in Irvine, California.
2. Many lawyers have experienced firsthand the detrimental effects of working with a bully. Rude, demeaning and bullying behavior is, unfortunately, not uncommon in many law firms. Some mistakenly believe such jerks must be tolerated because they may also happen to be rainmakers or generate high billable hours.
3. *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80–81 (1998).
4. The companion article by Patricia Perez, *Practical Ways to Deal With Workplace Bullies*, 22 Cal. Labor & Employment Law Review 34 (Issue No. 3, May 2008) provides expanded recommendations for employers in addressing bullying behavior.
5. Loreleigh Keashly, *Emotional Abuse in the Workplace: Conceptual and*

Empirical Issues, 1 J. EMOTIONAL ABUSE 85 (1998); see ROBERT SUTTON, PH.D., *THE NO ASSHOLE RULE: BUILDING A CIVILIZED WORKPLACE AND SURVIVING ONE THAT ISN'T* 10 (Warner Business Books 2007), for his “Dirty Dozen” list of common bullying actions.

6. Liz Urbanski Farrell, *Workplace Bullying's High Cost: \$180M in Lost Time, Productivity*, ORLANDO BUSINESS JOURNAL, Mar. 15, 2002.
7. *Id.*
8. Mark Larson, *Stamping Out Workplace Bullying*, WORKFORCE MANAGEMENT ONLINE July 2007, available at <http://www.workforce.com/section/09/feature/25/00/29/index.html> (last visited March 21, 2008); SUTTON, *supra*, at 47.
9. American Psychological Association “Bullying More Harmful Than Sexual Harassment on the Job, Say Researchers” Science Daily, (2008, March 9). Retrieved March 10, 2008 from <http://www.sciencedaily.com/releases/2008/03/080308090927.htm>.
10. *Id.*

do no good. They believe that they work for a company whose culture permits bullying behavior. In fact, some companies celebrate it.¹ If this is the case, then managers and human resources professionals have little power to stop the behavior; but, at the very least, they should make clear to senior management that the consequences of failing to correct the behavior are high—both from a business perspective (low morale, low productivity, high turnover and a high likelihood that others will also start behaving badly) and potentially from a legal perspective (in some cases the bully herself will sue the company alleging discrimination or retaliation, and in other cases the employees exposed to the bad behavior will claim they have been subject to a “hostile work environment,” and may be able to creatively link the bully’s behavior to some protected category).

- Review company policies to make sure they clearly set expectations about how to behave at work. Although the company may opt to have a specific policy covering bullying behavior, the more

effective route is to have a policy addressing ethics, acceptable (and unacceptable) behavior at work and the expectation that, although not all employees need to be best friends in order to work together, all must conduct themselves in a mature and professional way. Make sure the policy makes it clear to all employees (from line employee to CEO) that they are expected to behave appropriately towards one another.

- Once this expectation is communicated, **make everyone accountable** for following the policy. For example, when evaluating employees and managers, make sure you rate them on their ability to work well with others and their willingness to behave professionally with co-workers, subordinates and supervisors.
- **Be consistent in your treatment of bullies.** In one investigation, numerous mid-level and senior managers accused the CEO of being a jerk at work. Though the managers were not linking the CEO’s bad behavior to a legally protected category, they invoked the company’s policies providing that all employees would be treated with digni-

ty and respect. A former senior manager claimed that the CEO’s bad behavior tangibly affected her, asserting that the CEO fired her in retaliation for filing a worker’s compensation claim (ironically, a stress claim arising out of the workplace conditions that the CEO had created). When interviewed, the CEO admitted that the former employee did not have performance issues, but said that she had to fire her for being insubordinate, having a “bad attitude” and rudeness to others. In addition to serious issues regarding the timing of the termination, it was particularly hard to justify the termination on the grounds that the former employee was a jerk when the CEO herself had behaved in even worse ways. (Though there was some testimony regarding the former manager’s bad behavior, it paled in comparison to the mountains of evidence regarding the CEO’s rude and disrespectful behavior.)

- **Review corrective measures for common sense and basic fairness.** A key to dealing with jerks at work is to institute fair corrective measures—ones that are not only commensurate to the wrong-

11. *Id.*
12. *Id.*
13. The movement to legally mandate civil workplace behavior started internationally, with Canada, Australia, and Sweden leading the way. Act Respecting Labour Standards § 81.18 et seq. (1980)(Quebec); Occupational Health and Safety Act of 1985 (1985) (Austl. Vict.); Ordinance of the Swedish Nat'l Bd. of Occupational Safety and Health Ord. AFS 1993:17 (1993). Anti-bullying laws have also been adopted in Ireland (Code of Practice Safety, Health and Welfare Act of 2005, No. 10 (2005)) (Ir.); and Saskatchewan (Amend. to Occupational Health and Safety Act of 1993 Harassment Prevention. No. 66 of 2006–07 (2007) (Can.)). Like the United States, the United Kingdom has a general anti-harassment law, the Protection from Harassment Act of 1997, which does not mention bullying per se but has been utilized as a means of redressing issues of harassment in the workplace.
14. See David Yamada's Curriculum Vitae at http://www.law.suffolk.edu/faculty/addinfo/yamada/Yamada_CV_June07.pdf (last visited March 24, 2008).
15. See California Assemb. Bill No. 1582 (2003–04 Reg. Sess.) (AB 1582). Anti-bullying legislation is currently pending in New York (Healthy Workplace Bill for New York State, A10291, introduced on March 17, 2008). This is the third version introduced in New York—two previous unsuccessful versions were introduced there 2006 and in 2007. Connecticut, Vermont and Washington all had active legislation in 2008. Since 2003, similar “healthy workplace” or “anti-bullying” legislation has been introduced in Massachusetts (2005), Missouri (2006), Kansas (2006), Oklahoma (2007, 2004), Hawaii (2007, 2006, 2005, 2004), Montana (2007), Oregon (2007, 2005), Washington (2007–08, 2005–06), Vermont (2008, 2007), Connecticut (2008, 2007) and New Jersey (2006–07). See <http://workplacebullyinglaw.org/status/past.html> (last visited March 23, 2008). Federally, Senator Edward Kennedy and Congressman John Lewis are supporting Senate Bill 2554, also known as the Civil Rights Act of 2008. Although the bill speaks largely to historic protection of civil rights, it also seeks to expand those rights for employees and hold employers increasingly accountable for violations in the workplace.
16. See, e.g., the text of AB 1582; see also New York AB No. 10291.
17. Workplace Bullying Legislative Campaign. State-by-State Legislative History of the Anti-Bullying Healthy Workplace Bill Introduced in 13 States by 104 Sponsoring Legislators Since 2003. Available at <http://workplacebullyinglaw.org/billhistory.pdf> (last visited March 18, 2008).
18. AB 1582.
19. *Id.*
20. *Id.*
21. An employer must exercise “reasonable care to prevent and promptly correct” any form of harassing behavior and show that the plaintiff did not avail him or herself of the preventative or corrective opportunities. *Burlington Indus., Inc. v. Ellerth*,

doing, but that are also aimed at preventing the behavior from recurring. In making decisions about the appropriate discipline or corrective measures, make sure to ask how the actions will look in the future (for example, to juries).

In one case, numerous supervisors allowed a Human Resources Director (HR Director) to behave badly for years, each one thinking that she would eventually move on and the company would only need to endure the problem for a short time. Finally, a senior manager became the HR Director's boss and dealt with the problem. Although it was admirable that she was the first one to have the courage to deal with this toxic employee (who, in addition to bullying behavior, had serious performance problems which had never been addressed), she did so in a way that created more problems.

The senior manager began documenting every mistake that the HR Director made. She focused narrowly on the advice of “document everything,” but failed to be fair and use common sense. Rather than providing big-picture feedback about how the HR

Director was failing to meet the expectations of the job (both substantively and in terms of her unacceptable behavior), the senior manager focused on minutia—citing every typographical error made in e-mails and memos, reprimanding her for arriving a few minutes late to some meetings and vaguely saying she had a “bad attitude.” The warning memos and meeting notes read as though this senior manager was on a warpath to “paper the file” in order to justify the HR Director's eventual termination.

The HR Director alleged race discrimination, using the senior manager's own memos against her in an attempt to show both that the senior manager had unreasonable expectations (after all, no previous manager had criticized her performance or attitude) and that the senior manager “had it in for her,” having made the decision to fire her long before carrying out the termination. Thus, the senior manager, although courageous enough to try to tackle the problem, went about it in a way that appeared unfair and potentially created more problems.

- When instituting discipline, coaching employees or implementing any corrective measure, some **common-sense steps** need to be taken, that are as important in cases involving bullying behavior as they are in any other instance of an employee falling below expectations. They include:

- Setting clear expectations, and, if possible, a recitation of how those expectations have been communicated to the employee.
- Listing specific ways in which the employee fell below expectations (although, as noted above, not in a way that appears to be nit-picking).
- Listing the resources that the company and supervisor will provide to help the employee succeed, while providing enough time and specificity for the employee to improve. The company's efforts should be sincere.
- Obtaining a commitment from the employee that she is willing to do better.

- 524 U.S. 742, 765 (1998); *Faragher v. Boca Raton*, 524 U.S. 775, 807 (1998).
22. Additional provisions of the legislation include a cap on emotional distress damages of \$25,000 (unless the complaint includes a claim for an adverse employment action), affirmative defenses and exhaustion of remedies should employee choose to file a workers' compensation claim. See text of AB 1582.
 23. "Mobbing" is often used as a synonym for workplace bullying. The City and County of San Francisco defined mobbing as a form of harassment "where one group of employees psychologically harasses or bullies another colleague" which directly impacts both the victim of the harassment but also infects the entire work environment. See City of San Francisco Resolution requesting the Dept. of Human Resources to recognize the detrimental impact of mobbing on creating a safe and productive workplace for all employees. Res. No. 41-07 (adopted Jan. 23, 2007).
 24. City of San Francisco Resolution requesting the Dept. of Human Resources to recognize the detrimental impact of mobbing on creating a safe and productive workplace for all employees. Res. No. 41-07 (adopted Jan. 23, 2007).
 25. City of Berkeley Commission on Labor, Agendas and Meeting Minutes, available at <http://www.ci.berkeley.ca.us/commissions/labor/default.htm> (last visited March 24, 2008).
 26. Stamping out Workplace Bullying, *supra*, note 8.
 27. Wendy Mclellan, *Bullying in the Workplace*, THE PROVINCE, March 16, 2008.
 28. *Id.*
 29. *Id.*
 30. *Id.*
 31. "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e et seq.
 32. 42 U.S.C. § 2000e et seq.
 33. *Oncale*, *supra*, 523 U.S. at 78 (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)).
 34. *Id.* (quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993)).
 35. *Williams v. General Motors, Corp.* 187 F.3d 553, 565 (6th Cir. 1999).
 36. See Maureen McClain, *Employment Termination Law, A Practical Guide For Employers*, (CEB, 1995), 29 (citing to Title VII, 42 U.S.C. § 2000e et seq.; Americans With Disabilities Act, 42 U.S.C. §§ 12101-12213; California FEHA, Cal. Gov. Code §§ 12900-12996).
 37. *Oncale*, *supra*, 523 U.S. at 80; see also *Meritor*, *supra* 477 U.S. at 67 (the "mere utterance of an . . . epithet which engenders offensive feelings in a employee" does not sufficiently

- Checking for consistency in how others who have behaved similarly, regardless of rank, have been treated.

Dealing With Co-Workers Affected by Jerks

In addition to dealing with the jerk herself, employers also need to act in order to protect the co-workers affected by the jerk's behavior. The measures that employers can and should take to make sure they are providing a fair and respectful environment include:

- **Truly resolving issues.** We all know that employers should promptly and thoroughly investigate claims of harassing behavior; however, many employers fail to truly resolve the issues. Often, an employer will find that there was no egregious behavior or no policy violation, and will stop there.
- **Taking meaningful steps.** If there has been behavior contrary to the company's expectations (e.g., respectful treatment of all employees) that has caused low morale or low productivity, or has caused a real perception of unfairness in

the workplace, the employer should go further than simply finding and reporting that there was no wrongful behavior. And, to the extent the company believes some corrective measures should be implemented, it should go beyond providing additional training (although this is a good place to start). For example, the company should also look at its complaint process—is it truly aimed at creating an environment where employees will feel comfortable voicing their concerns? Does the company have a history of addressing and resolving employee relations issues? Do supervisors understand their obligation to create both a comfortable and respectful environment while still maintaining good business practices? Are supervisors behaving fairly *and* creating a perception of fairness? Are supervisors consistently providing employees with due process when dealing with these issues (i.e., is the process used to investigate and resolve these issues fair and reasonable)? Can the company mediate disputes between employees before they become a bigger problem?

- **Assessing workplace attitudes.** In order to have the opportunity to resolve issues early on, companies should be proactive about maintaining a healthy work environment. To this end, conducting periodic climate surveys to gauge employees' attitudes can go a long way towards nipping problems in the bud.

Companies that want to stay competitive understand that a key component to success is a happy and productive employee base. Though it may not be possible to avoid all bad behavior at work, companies should implement good practices to prevent bullying behavior from seriously affecting the work environment. ⁴²

ENDNOTES

1. ROBERT SUTTON, THE NO ASSHOLE RULE Ch. 6 (Warner Business Books 2007).
2. See, e.g., *Verga v. WCAB*, 159 Cal. App. 4th 174 (2008) (when coworkers responded unfavorably to harassment by employee, that employee's claim for stress-related injury to her psyche was rejected).