LABOR & EMPLOYMENT

Fighting Workplace Bullies

By Eric Tate

Statistics indicate that bullying behavior is a prevalent issue in American workplaces. With many American workers spending most of their waking hours at work, there is no doubt that having to deal with a boss or co-worker who is a jerk can add unwanted stress to one's life. Against this backdrop, employee advocates argue that laws should be passed to make bullying unlawful, essentially on par with gender, race, age or disability discrimination. While such bills have been introduced in the legislatures of 16 states across the country, none has passed. In January 2009, yet another, the Healthy Workplace Act, was introduced for consideration by the Massachusetts state legislature. Most recently, in May 2009, the legislatures of Illinois and New York passed bills commissioning studies of bullying in the workplace. While these studies presumably will conclude that bullying in the workplace is a problem, the real question is whether an anti-bullying law is really necessary.

The answer is no. American workers already have sufficient protections from workplace bullying conduct that "crosses the line." More laws would be superfluous, only serving to create an unworkable workplace civility code, which the U.S. Supreme Court already has rejected.

To begin with, every state has workers' compensation legislation designed to cover workplace injuries that employees routinely use for workplace emotional stress. Further, a bevy of state and federal laws already proscribe employment discrimination and harassment based on characteristics that our legislators have determined warrant protection. Indeed, courts already recognize that "rude, overbearing, obnoxious, loud, vulgar, and generally unpleasant" conduct directed at both male and female employees can be actionable as employment discrimination under Title VII. In *EEOC v. National Education Association*, 422 F.3d 840 (9th Cir. 2005), for instance, the female plaintiffs complained that they were subjected to a hostile environment by a stereotypical "jerk" boss, who literally yelled, screamed, threw papers and otherwise intimidated employees. The employer presented what in effect was the "equal opportunity harasser" defense, arguing that the supervisor at issue acted in such a manner to both male and female employees. Nonetheless, the court refused to grant the employer's summary judgment motion, finding that "offensive conduct that is not facially sex-specific" may violate Title VII if there is "sufficient circumstantial evidence of qualitative and quantitative differences in the harassment suffered by female and male employees."

The availability of remedies for alleged victims of workplace bullying under existing employment discrimination and harassment statutes and the common law appears to be strong.

Similarly, the *Court in Pappas v. J.S.B. Holdings Inc.*, 392 F.Supp.2d 1095 (D. Ariz. 2005) denied an employer's summary judgment motion as to an employee's claims that she was the victim of workplace bullying and harassment in violation of Title VII. The plaintiff alleged that co-workers yelled at her, cussed at and around her, gave her dirty looks, bumped into her, tampered with her computer, stapled her business cards together, put shredded paper in her desk drawer, sent sarcastic e-mails, criticized her work in a sarcastic manner and otherwise harassed her in an attempt to get her to quit, which she ultimately did. The court noted that almost all the specific instances of "aggravating and antagonistic conduct" about which the plaintiff complained, were "on their surface neither sexual in nature nor gender directed." Nonetheless, the court determined that the use of certain misogynistic terms by the plaintiff's co-workers might permit a jury to conclude that their behavior was prompted at least in part by her gender, and allowed her case to proceed to a jury.

Likewise, alleged victims of workplace bullying have long been able to and continue to obtain relief under common law remedies for infliction of emotional distress, assault, battery, negligent hiring and supervision and other related claims. In *Subbe-Hirt v. Baccigalupi*, 94 F.3d 111 (3rd Cir. 1996), for example, the plaintiff's supervisor routinely subjected the plaintiff and other employees to a "root canal"-intense and emotionally painful sessions in which the supervisor would berate and demean disfavored employees with the intent of forcing them to quit. The *Subbe-Hirt* court held that the plaintiff's claim for intentional infliction of emotional distress against her supervisor should not have been dismissed on summary judgment.

Just last year, the Supreme Court of Indiana upheld a $325,000 jury verdict awarded to an employee who claimed to have been subjected to workplace bullying. The plaintiff in *Raess v. Doescher,* 883 N.E.2d 790 (2008), sued his employer for assault. Specifically, the plaintiff testified that during an argument at work, his employer became angry (face turned red), walked toward him with his fists balled up but at his sides, and walked out after yelling to the plaintiff, "You're over. You're history. You're finished." The employer appealed the jury verdict, in part arguing that the trial court should not have permitted an expert witness to testify that the employer was a "workplace bully." On appeal, the court rejected the employer's challenge and upheld the jury verdict for the plaintiff.

Accordingly, the availability of remedies for alleged victims of workplace bullying under existing employment discrimination and harassment statutes and the common law appears to be strong.

Nonetheless, employee advocates continue to push for the adoption of additional laws that would specifically render workplace bullying unlawful.

The Healthy Workplace Act, an act addressing workplace bullying, mobbing and

harassment, without regard to protected class status, was introduced in Massachusetts. The act would make it unlawful to subject an employee to an "abusive work environment," which exists when an employer, acting with malice, subjects an employee to "abusive conduct so severe that it causes tangible harm to the employee." The act states that "abusive conduct" may include, repeated infliction of verbal abuse, verbal or physical conduct of a threatening, intimidating or humiliating nature, sabotage or undermining an employee's work performance or exploiting an employee's known psychological or physical vulnerability.

Of the many problems with the act and similar legislation, three are particularly obvious and severe. First, it subjects employers and workers to liability for a wide range of merely annoying, boorish and rude activities occurring in offices across the country every day that many people would not deem unlawful. Second, with America's federal, state and local governments facing historic deficits and budget cuts, exactly how are courts supposed to make room in their already overcrowded dockets for what undoubtedly will be a flood of new lawsuits based on such merely obnoxiousactivities by alleged workplace bullies? Do we really want to see our courts spending their time and our tax dollars adjudicating whether Company A is full of jerks who bully people at work? Third, to the extent that more egregious conduct does occur, existing laws already provide remedies for it.

The reality is that laws already exist to address a wide swath of actual and perceived wrongs in the workplace. No less than the highest court of the land has said as much. In *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), the U.S. Supreme Court held that petty slights, minor annoyances or a simple lack of good manners are not unlawful. The court explained that judicial standards must filter out the significant, objective harm from complaints about the ordinary tribulations of the workplace such as the sporadic use of abusive language or snubbing by supervisors or co-workers. Employers, therefore, can take solace that Title VII does not "set forth a general civility code for the American workplace." If anything, perhaps efforts should be focused more on training and education regarding existing laws and appropriate workplace behaviors, instead of creating new laws to establish what is from a legal perspective, an unnecessary and from a practical perspective, an unworkable, general civility code for the workplace.

Eric Tate is a litigation partner at Morrison & Foerster in San Francisco specializing in the counseling and litigation of labor and employment, employee mobility, and trade secrets issues on behalf of employers.