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Microinequities: Can bad behavior be actionable?

There is cause for concern over incivility, even if not technically illegal.

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TODAY, COMPANIES across the nation are training employees on "microinequities," the subtle putdowns, snubs, dismissive gestures or sarcastic tones that can undercut employee performance and encourage employee turnover. Opinion polls reflect that 44% of employees believe they have been abused or "bullied" by their supervisors, and 64% of those employees believe that they should be able to recover damages for this abuse. Against this backdrop, the U.S. Supreme Court recently held in *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405, 2415 (2006), that a retaliation claim can be based on conduct that might "dissuade...a reasonable worker from making or supporting a charge of discrimination."

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Specifically, the Supreme Court resolved a conflict among various U.S. courts of appeals regarding the scope of anti-retaliation claims, opting for the broadest reading of the law: To prove retaliation, "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." Id. at 2415 (internal quotations omitted). The court also emphasized that context matters: "The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." Id. (quoting *Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75 (1998)).

The court's decision in *Burlington Northern* may lead some to contend that the court opened the door to retaliation suits based on conduct that until now was considered trivial and not actionable. Indeed, with increased scrutiny on less clearly offensive behavior in the workplace, e.g., microinequities or bullying, this issue has gained significantly more exposure with employers.

On the other hand, the court made it clear in *Burlington Northern* that microinequities do not equal adverse action for purposes of retaliation claims. Even under the court's new standard, there will be a range of conduct that may actually dissuade employees from complaining about discrimination but that will not be actionable. *Burlington Northern* did not go so far as to include as adverse actions the "petty slights or minor annoyances that often take place at work and that all employees experience." 126 S. Ct. at 2415.

'Burlington' held that petty slights are not unlawful retaliation.

Indeed, even the California Supreme Court (in a state known to have particularly employee-friendly labor and employment laws) adopted a more narrow definition of adverse action in retaliation cases: Only acts that, from an objective perspective, materially affect the terms, conditions or privileges of employment are within the reach of California's anti-discrimination laws. *Yanowitz v. L'Oreal USA Inc.*, 36 Cal. 4th 1028, 1054 (2005). See also *McRae v. Dept. of Corrections & Rehabilitation*, 142 Cal. App. 4th 377, 386 (Ct. App. 2006) ("If every minor change in working conditions or trivial action were a materially adverse action[,] then any action that an

irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit.").

Further, in the wake of the *Burlington Northern* decision, district courts across the country continue to discount minor slights against employees in retaliation and discrimination cases. See, e.g., *Higgins v. Gonzales*, No. 06-2556, 2007 U.S. App. Lexis 6402, at *29-*30 (8th Cir. March 20, 2007) (lack of mentoring or supervision, without more, are not adverse employment actions); *Hallberg v. Pendelton Mem'l Methodist Hosp.*, No. 05-630, 2006 U.S. Dist. Lexis 77286, at *27 (E.D. La. Oct. 24, 2006) (rejecting retaliation claim based on "horseplay, which stemmed from general personal animosity between Brady and Plaintiff"); *Moore v. Consol. Edison Co. of N.Y. Inc.*, No. 00-Civ. 7304, 2007 U.S. Dist. Lexis 19118, at *31 (S.D.N.Y. March 20, 2007) (exclusion from meetings not relevant to job duties is not evidence of hostile work environment); *Cobb v. Potter*, nos. 1:04CV128, 1:05CV300, 2006 U.S. Dist. Lexis 63118, at *43 (W.D.N.C. Aug. 22, 2006) (change of schedule by one hour is not an adverse employment action); *Gamble v. Chertoff*, No. 04 Civ. 9410, 2006 U.S. Dist. Lexis 93645, at *23 (S.D.N.Y. Dec. 27, 2006) (ordering employee to switch cubicles is not an adverse employment action).

Growing concern about civility

Despite the clear legal standards indicating that microinequities are not actionable, there is an increasing emphasis on diminishing civility in the workplace generally. Articles in the *New York Times*, *Wall Street Journal* and *Time* magazine, for example, reflect the growing concern of corporations across the country about the impact of microinequities on employee morale, productivity and attrition. See, e.g., Joann S. Lublin, "Improve Morale by Eliminating Subtle Slights in the Workplace," Wall St. J. Online (2004), www.careerjournal.com/columnists/manageyourcareer/20041208-managingyourcareer.html; Julie Rawe, "Why the Boss May Treat You Right" (also entitled "Why Your Boss May Start Sweating the Small Stuff"), Time, March 15, 2006, www.-time.com/time/magazine/article/ 0,9171,1172212,00.html.

By way of brief background, microinequities are subtle messages that devalue, discourage and ultimately impair performance in the workplace. They include, for example:

- Dismissing the idea of one employee only to embrace it when paraphrased by another.
- Using a formal handshake with one employee and a playful pretend punch with another employee, who will then be perceived (correctly or not) to be in management's "inner circle."
- Going out to lunch with certain employees more frequently than others.
- Not saying "good morning" or otherwise greeting employees.
- Checking one's BlackBerry or otherwise multitasking while speaking to an employee.
- Addressing some employees by chummy nicknames, and others more formally.
- Crossing one's arms when listening to a comment from an employee.
- Routinely being late for or leaving early from meetings.
- Ridiculing accents or peculiar speech patterns of employees.
- Continually interrupting employees or completing sentences for people.

Similarly, there has been increasing concern over workplace abuse and bullying. According to a recent poll by the Employment Law Alliance, a network of labor and employment attorneys representing primarily employers, 44% of American workers have worked for a supervisor or employer whom they consider abusive. Workplace abuse and bullying generally take one of two forms. At one extreme, bullying may refer to the supervisor who is rude, overbearing, obnoxious, loud, vulgar and generally unpleasant. This supervisor also may be physically threatening to his or her employees.

At the other extreme, workplace abuse or bullying may closely resemble acts associated with microinequities, such as the supervisor who makes a sarcastic joke or teasing remarks about employees; interrupts employees in a rude manner; gives employees a "dirty look"; spreads rumors; or ignores employees. "New Employment Law Alliance Poll: Nearly 45% Of U.S. Workers Say They've Worked For An Abusive Boss," March 21, 2007, available at www.employmentlawalliance.com/pdf/ELA%20Abusive%20Boss%20Charts031907.pdf.

Although *Burlington Northern* and its progeny firmly establish that microinequities, alone, are not actionable, bullying has received attention from the federal courts and state legislatures. In *EEOC v. NEA*, 422 F.3d 840, 845 (9th Cir. 2005), for example, the 9th U.S. Circuit Court of Appeals addressed whether "rude, overbearing, obnoxious, loud, vulgar, and generally unpleasant" conduct directed at both male and female employees could be grounds for employment discrimination under Title VII of the Civil Rights Act of 1964. The 9th Circuit responded "yes":

Still, U.S. courts and state legislatures are focusing on the issue.

"[O]ffensive 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." Id. While the 9th Circuit ultimately found a connection between gender and the bullying conduct, the decision did not address whether bullying conduct that cannot be tied to disparate treatment between employees of protected categories might someday (because *Burlington Northern* says "no" for now) be actionable.

Possible state legislation

At the legislative level, at least 11 states are considering laws that would give victims of office bullying redress even if not based on a protected category. Tresa Baldas, "States take aim at taming 'bully bosses,' " NLJ, April 9, 2007, at 4. Re-

gardless of the merit of such legislation (arguably, tort and workers' compensation laws cover any claims that may arise from microinequities or bullying), the fact that legislators are even considering the issue is sufficient reason for employers to take heed of workplace conduct.

The question of whether employers should worry that workplace civility (or lack thereof) will lead to employment law liability must be analyzed in the context of the historical evolution of employment law. For example, when first enacted, Title VII's prohibition of discrimination based on "sex" referred primarily to protecting females from differential treatment in employment decisions when compared to males. It was not until 1976, more than 10 years later, that "quid pro quo" harassment—harassment conditioning concrete employment benefits on submission to sexual advances—first became a recognized legal theory. See *Williams v. Saxbe*, 413 F. Supp. 654 (D.C. Cir. 1976), vacated on other grounds sub nom. *Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978). Similarly, it was not until the 1986 Supreme Court decision in *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57 (1986), that hostile work environment claims became cognizable.

The U.S. Supreme Court's decision in *Burlington Northern* appears to confirm that employers need not be alarmed about liability for microinequities just yet. There are, however, several reasons why employers should still be concerned about microinequities in the workplace.

First, microinequities can be used as "atmospheric evidence" of discriminatory animus to support discrimination claims based on more severe conduct. For instance, the 2d Circuit recently found that a supervisor's micromanaging of a female subordinate and criticism of her for being five minutes late to meetings (when male employees could allegedly skip them altogether with impunity) could give rise to an inference of gender discrimination. *Demoret v. Zegarelli*, 451 F.3d 140, 152 (2d Cir. 2006).

Second, microinequities may provide evidence of retaliation when plaintiffs allege a "course of conduct" rather than individually actionable retaliatory acts. As the California Supreme Court has stated, "there is no requirement that an employer's retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging injuries." *Yanowitz*, 36 Cal. 4th at 1055. Courts faced with allegations of this sort "need not…decide whether each alleged retaliatory act constitutes an adverse employment action in and of itself." Id.

Helping to reduce all slights

Third, increasing sensitivity to minor slights should reduce the occurrence of all slights. Microinequities can predispose their perpetrators toward yet more serious discrimination and may block helpful behavior. See Mary P. Rowe, "Fostering Diversity, Some Major Hurdles Remain," Change Magazine, at 35-39 (March/April 1993). By educating employees about otherwise unconscious or semi-conscious messages of disrespect, employees are more likely to refrain from conduct that may be more clearly offensive and form the basis for claims of more overt discrimination.

Fourth, many lawsuits start because employees feel marginalized, excluded and trivialized. Employment attorneys everywhere can attest to similar conflicts involving a series of microinequities—i.e., the elderly employee who is asked if he has planned for retirement, the minority employee who is excluded from office lunches or gatherings—that became bigger issues because they were ignored and employee resentment allowed to fester and build up over time.

In *Owen v. Sunstar Acceptance Corp.*, No. 98-0672-M, 1999 U.S. Dist. Lexis 16932, *13-*15 (S.D. Ala. Oct. 7, 1999), for example, the plaintiff asserted that the harassment consisted in large part "of being left out of office lunches, other gatherings and meetings." Although the plaintiff lost the case, any employer who has successfully defended an employment lawsuit knows that a defense verdict in these cases is the ultimate Pyrrhic victory. Employers that are conscious of the effect of microinequities therefore are likely to reduce the number of lawsuits brought against them generally.

Fifth, under both state and federal law, employers have a duty to prevent discrimination and harassment. Education and training on microinequities is one way for employers to demonstrate that they are fulfilling that duty.

'Glass ceiling' environments

Finally, repeated slights and exclusions are often reported as contributing to "glass ceiling" environments and otherwise impeding the advancement of people of protected categories up the corporate ladder. This happens because microinequities communicate a lower level of expectation in performance and are often directed at employees who are considered to be less than star players. Attention to microinequities may help eliminate these often unconscious barriers.

Burlington Northern and the cases that have interpreted it appear to make clear that the boundaries delineating employer liability have not expanded to include the petty slights and minor annoyances common in many workplaces. Although there does not appear to be current cause for employer alarm, there nonetheless are sufficient reasons for employers to be concerned about these microinequities. Simply put, being mindful of, and trying to eliminate, microinequities in the workplace will not only promote employee retention and overall corporate performance, but also should reduce employer liability for employment law claims in general. NLJ