Schaffer Law, LLC
Labor and Employment Law

Don't Let Workplace Bullies Cause You a Black Eye

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Workplace bullying may be lawful, but it is bad for business. In a 2012 survey by CareerBuilder, about one third of all employees reported being bullied at work. About seventeen percent of those bullied quit their jobs, while a similar percentage reported health problems related to the bullying behavior. Employers pay a direct cost for such behavior in turnover and increased medical premiums. In addition, plaintiff attorneys are studying new strategies to bring suits against companies who continue to tolerate abusive behavior. Given the conduct employees must often contend with, it is easy to see why.

For instance, a well-known plaintiffs' attorney, Nina Pirrotti, recently wrote in the Connecticut Law Tribune about a case her firm handled. "Workplace Bullying: A Problem for Everyone," (December 22, 2014). Her client worked for a company for 19 years and received consistently glowing reviews. He planned to work there until retirement. As is often the case, a change in bosses created a very different culture that significantly altered the work environment. One day the new boss called the employee in, shut the door, and asked him to sit down. She told the employee that she was very disappointed with his work, that he should pack his belongings, and leave by the end of the day. He was fired.

In response the employee began to cry as he contemplated his loss of income and the end of his career with the firm. The boss then burst out laughing and told him it was just "a joke." When the employee stated that it was not funny, she told him that if he could not take a joke, she was going to have to treat him differently and went on to do so. Even though he complained to

HR, the mistreatment continued and led to health problems, including migraines and treatment for an anxiety disorder.

While some may think this story is unusual, unfortunately it isn't. In my own practice, I get frequent calls from employees reporting variations of the same abusive treatment. Often, there is little that can be done, and employees are left with accepting the conduct, or moving on to a new employer. The abuser then just selects a new target from among the co-workers left behind. These bullies are able to succeed because there are no laws that expressly prohibit this kind of behavior, unless the harassment can be tied to a protected class like gender, race or age.

Attempts by the Connecticut legislature to make such conduct unlawful have failed. Some progress has been made in California where a new law requires employers of 50 or more employees to add anti-bullying elements to their training curriculum, in addition to already required harassment, discrimination and retaliation training. It does not, however, provide a private right of action to bring claims for bullying behavior.

One of the problems typically cited when trying to pass an anti-bullying law is the difficulty in defining the unlawful behavior. California's law defines it as "the conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive and unrelated to an employer's legitimate business interests. Abusive conduct may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating or humiliating, or the gratuitous sabotage or undermining of a person's work performance. A single act shall not constitute abusive conduct, unless especially severe and egregious."

In addition to attempts to pass new laws, plaintiff attorneys are championing the use of other laws already on the books to deal with workplace abuse. Because the Connecticut Supreme Court has already ruled that a seemingly fitting claim of negligent infliction of emotional distress is inapplicable, unless the distress is caused by a negligent termination process, Perodeau v. City of Hartford (1992), more creative solutions are needed.

Some that come to mind include claims for negligent supervision, intentional infliction of emotional distress when the behavior is "extreme and outrageous," tortious interference with business expectancies where the conduct prevents an employee from doing his job, and promissory estoppel where the employee is retaliated against for reporting the behavior under an employer's open door anti-retaliation policy. Perhaps the best basis for a successful claim was articulated by Attorney Robert Mitchell in his recent article "Connecticut Already Has Workplace Anti-Bullying Law," Connecticut Law Tribune, (December 22, 2014).

In his article Mitchell suggests that Conn. Gen. Stat. §31-49 already provides a potential remedy for severely mistreated, "bullied" employees. He notes that the statute instructs that: "It shall be the duty of the master to exercise reasonable care to provide for his servant a reasonably safe place in which to work, reasonably safe appliances and instrumentalities for his work, and fit and competent persons as his co-laborers, and to exercise reasonable care in the appointment or designation of a vice-principal, and to appoint as such vice-principal a fit and competent person. The default of a vice-principal in the performance of any duty imposed by law on the master shall be the default of the master."

In tracing the history of §31-49, which was passed in 1902, he notes it was a predecessor to the state's 1913 workers' compensation statute. Insofar as the workers' compensation law addresses the safe workplace issue, it supersedes §31-49. However, where the workers'

compensation statute leaves gaps, §31-49 remains the law of the land. The Connecticut Supreme Court made this clear in a 1985 ruling in which it held that §31-49 could be relied on to fill gaps that existed in the Workers' Compensation Act. Perille v. Raybestos–Manhattan–Europe, 196 Conn. 529 (1985).

When the Workers' Compensation Act was amended in 1993 to remove coverage for emotional distress claims not arising out of physical injury, a gap was arguably created for emotional injuries stemming from non-physical workplace injuries. Therefore, emotional distress caused by bullying behavior might form the basis for a §31-49 claim.

Mitchell goes on to suggest that the Supreme Court's decision in Parsons v. United Technologies, Sikorsky Aircraft, 243 Conn. 66 (1997), which established that §31-49 could form the basis of a public policy wrongful discharge claim when an employee was subjected to a physically unsafe workplace, might apply to bullying related behavior. This concept could also potentially be expanded to a constructive discharge when the employee quits in response to bullying behavior.

While not necessarily an easy burden to meet, §31-49 opens the door for victims of bullying behavior, provided the employee can show that the abuse led to an unsafe workplace that objectively created a substantial risk of severe emotional injury. Alternatively, and possibly easier to prove, would be cases where a bullying co-worker, or a supervisor who allows the bullying, are shown to be incompetent or unfit.

It is likely that the courts would impose an obligation on the plaintiff to show that a complaint about the coworker bullying behavior was lodged with the employer's responsible representative, and that the employer took no effective responsive action. Filing an internal

complaint would likely not be required if the bullying was carried on by a supervisory employee as automatic liability would normally attach to the employer.

Attorney Mitchell closes with his observation that the intent of Conn. Gen. Stat. §31-49 and its mandate that employers provide employees with a reasonably safe place to work, and fit and competent coworkers and supervisors, provides victims a statutory remedy for their emotional injuries, or constructive termination from employment, caused by workplace bullying, without the need for additional legislation.

While the theories outlined above have yet to be tested in court, it is clear that the problem is significant, attorneys are aggressively studying new approaches, and employers should stop tolerating such behavior immediately no matter how wonderful they believe the bully's other attributes may be.

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