



Giuseppe Franzella / Photo by Bob Giglione

Standing up to workplace bullies

By: Joseph Kellard October 19, 2015 0

While anti-bullying and anti-cyberbullying laws are virtually ubiquitous in public schools nationwide, New York and most other states are without comparable legislation for the workplace, where the worst schoolyard behavior can spill over well into adulthood.

Anti-bullying legislation, known as the Healthy Workplace Bill, has been pending in the state legislature for years. It would establish a civil cause of action for employees but doesn't include language specific to cyberbullying, a growing trend in our increasingly social media-centric world of communications.

The movement to address bullying through the law has been afoot in New York since at least 2006, when the Healthy Workplace Bill was introduced. It passed the state Senate in 2010 but has been stuck in the Assembly since then.

While civil litigants for years have been able to bring claims about a hostile work environment, these have generally fallen under discrimination based on a protected class that includes race, sex, sexual orientation and age. The Healthy Workplace Bill states that employees who have been subject to abusive treatment who cannot establish that it was motivated by discrimination based on race, age or other protected statuses "are unlikely to be protected by the law against such mistreatment."

"The purpose of this article," a summary of the bill reads, "shall be to provide legal redress for employees who have been harmed psychologically, physically or economically by deliberate exposure to an abusive work environment, and to provide legal incentives for employers to prevent and respond to abusive mistreatment of employees at work."

Mike Schlicht, the upstate coordinator of the New York Healthy Workplace Advocates, a self-funded affiliate of the national Workplace Bullying Institute, characterizes workplace bullying as a series of documentable incidents that cumulatively show a pattern of behavior that is abusive and interferes or sabotages a worker's ability to perform his or her responsibilities.

"This is not about name calling or harassing a person based on something that you can identify," Schlicht said of the bill that his organization has spearheaded. "It's about interfering with your work so you can't be successful or not allowing the person to have the resources that they need or had enjoyed to perform their job."

Schlicht cites as potential examples of workplace bullying incidents in which an employer or superior does not allow an employee to attend a meeting that their responsibilities require or entail, or writing up an employee for an infraction that other workers have committed but who were not subject to the same or any discipline.

"So you have to show some of these types of issues, and you have to show the employer or human resource person, when the state passes the full version of the Healthy Workplace Bill, that you've incurred damages in different ways from these actions," Schlicht said.

The bill defines "serious harm" inflicted on a target of bullying to include "feelings of shame and humiliation, severe anxiety, depression, suicidal tendencies and symptoms consistent with post-traumatic stress disorder."

Lynn Brown, who is of counsel at Garden City-based [Meyer, Suozzi, English & Klein](#), said workplace bullying is about one person with more power in the company preying on someone who is or is perceived to be less powerful.

"Generally speaking, if it's hostility or aggression toward a target who is physically or emotionally weaker than the other person, that would properly be characterized as bullying," Brown said. "Why? Because it is something that causes pain and distress in the target."

Asked how the pain and distress may manifest themselves via electronic communication, whether through company-owned email or Facebook accounts, Brown offered, as an example, employees who "circulate a cartoon via email

that makes fun of someone else, either because the person in the cartoon looks like an employee or has something in common with that employee.”

If legislation such as the Healthy Workplace Bill starts to pass in New York and other states (currently, just California and Tennessee have anti-bullying workplace policy-only laws), Schlicht expects that documented social media communications can fall into the category of workplace bullying that a target can use to show a pattern of abusive behavior.

“Email is already a tool a person can now use to show this pattern, but without a law an employee is very unlikely to find any interest from the employer to address the issue, even if they wanted to,” Schlicht added.

One question surrounding cyberbullying involves electronic communications between coworkers outside of the office, through their personal email and social media accounts. If bullying occurs then, is the employer potentially culpable or somehow required to address such out-of-office communications?

Brown noted that the Dignity for All Students Act, which took effect at New York public schools in 2012, makes clear that schools can discipline students for cyberbullying that occurs off school property.

“With respect to the workplace, I think that it really turns on when the employer first knows about what’s going on,” Brown said. “I mean, obviously, if the employer has no way of knowing this, how can you hold the employer liable for it?”

Giuseppe Franzella, a partner in the commercial litigation practice group at Melville-based [Lazer Aptheker Rosella & Yedid](#), recalls lawsuits in New York and elsewhere in which the cases turned on where the conduct between coworkers occurred.

“Generally, the way that the cases came down is if it was outside of the workplace, there was no employer liability,” Franzella said. “So the employers were very often left off the hook entirely and dismissed from a case and generally outside the scope of exposure. Now, there is a greater incentive under the Healthy Workplace Bill for employers to terminate or sanction offenders who are harassing coworkers either at the workplace or outside of it.”

The bill states that the consequences to employers for an “abusive work environment,” which it defines, include reduced employee productivity and morale, higher turnover and absenteeism rates and a significant increase in medical and worker’s compensation claims.

Schlicht said that as long as an employer can show that an employee’s bullying behavior is costing the company time and money, the bill allows the employer to take corrective actions to resolve the issue. Among these options are to counsel the employee who is creating this environment, and/or make an equitable transfer of the targeted employee.

Franzella said the bill also allows employers to demonstrate that they had internal preemptive mechanisms in place, such as mandatory seminars for employees on what constitutes a hostile work environment, or manuals on the proper use of social media and emails, which will more easily establish a prima facie defense and clear them at the early stages of potential litigation.

“What the Healthy Workplace Bill will do is in part require employees to retain counsel prior to commencing litigation against an employer for harassment or hostile workplace environment and claims,” he said. “The bar will be raised and an employee will have to consider the costs of pursuing litigation.”

Anti-bullying and anti-cyberbullying laws and proposed legislation typically face opposition based on concerns over frivolous lawsuits and encroachments on free speech.

“If there is some lesson to be learned by employers here, it’s that, although the legislation is not necessarily inevitable, the sea change of what is a real issue of workplace bullying and cyberbullying is something that is not going away,” Franzella said. “It’s not a fad or trend and it’s going to be addressed in one way or the other.”

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