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How Those Jerks at Work Create Liability Problems for Employers

By Emily Prescott & Genevieve Ng¹

INTRODUCTION

What is the difference between a demanding boss—or a difficult coworker—and a certifiable jerk?² Under current law, the answer may not matter much, unless a complaining employee can link alleged offensive conduct to a protected trait. Though the United States Supreme Court has indicated that Title VII of the Civil Rights Act of 1964 (Title VII) is not a general civility code and does not prohibit all verbal and physical harassment in the workplace,³ in fact, buzzwords such as “hostile work environment” and “harassment” have become part of our vernacular. Even when the basis for a complaint turns out to be the perceived victimization of an employee by that jerk in the workplace, employers are still at risk for protracted litigation because so long as a potential plaintiff can state even

a tenuous connection to a protected status, these claims often cannot be resolved at an early stage.

Many are seeking to champion civility in the workplace through legislative means. A number of states have introduced legislation that would untether anti-harassment laws from a protected status. No state has yet passed such legislation, but in the meantime all employers have an interest in fostering civility in the workplace and inoculating their workplace against jerks. From a legal perspective, these days most employees bear one or more protected traits and can articulate at least a colorable connection between offensive behavior and that trait, prompting conscientious employers to conduct some form of investigation and respond to complaints about all bullying behavior much in the same way as they would for any harassment claim.

This article reviews recent attempts to legislate civility in the workplace, analyzes how victims of bullying may utilize existing law to seek redress, and makes recommendations for employers attempting to deal with this emerging issue.⁴

IMPACT OF BULLYING IN THE WORKPLACE

Bullying encompasses a variety of behaviors, including:

- Personal insults
- Yelling, screaming, and/or cursing
- Nasty, rude and hostile behavior
- Vulgar language
- Verbal and nonverbal threats and intimidation, including invading one's personal space or uninvited physical contact
- Teasing or sarcastic jokes
- Public displays of shaming or belittling

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Jerks at Work

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- Excessive criticism of another's work
- Ignoring or excluding people
- Spreading gossip or lies
- Accusations of wrongdoing
- Making unreasonable work demands.⁵

A study of 9,000 federal employees in 2002 reported that 42 percent of the female respondents and 15 percent of male respondents indicated having experienced some form of bullying behavior within the prior two years.⁶ The cost of this bullying behavior to the federal government was over "\$180 million in lost time and productivity."⁷ In his book *The No Asshole Rule*, Stanford Professor Robert Sutton cites another report documenting the cost to a company from just one jerk, a star salesman: "\$160,000 in turnover, overtime, and other costs created by handling problems caused by one star salesman's tantrums and insulting behavior."⁸

In fact, a recent survey suggests that workplace bullying is more harmful to employees than sexual harassment.⁹ A group of researchers reviewed over 100 studies conducted over a 21-year period that compared the "consequences of employees' experience of sexual harassment and workplace aggression."¹⁰ The research found that because sexual harassment has become more notorious and less accepted, society has responded by providing legal remedies and psychological support for victims. Bullying, on the other hand, is more subtle, and the "insidious nature of these behaviors makes them difficult to deal with[.]"¹¹ Employees subjected to bullying were more likely to quit their jobs, be less satisfied with their jobs, have less satisfying inter-personal relationships in the workplace and have a worse sense of well-being.¹²

THE MOVEMENT TO LEGISLATE A CIVIL WORKPLACE

In the United States,¹³ model "status-blind" anti-harassment legislation, known as the "Healthy Workplace Bill," was developed by Professor David Yamada of Suffolk University Law School, who has been a long-time advocate for

healthy work environments.¹⁴ In 2003, California was the first state to introduce the Healthy Workplace Bill; since then, another twelve states have introduced variations.¹⁵ These bills seek broader protection for employees facing workplace harassment by declaring abusive conduct unlawful, regardless of whether the harassment is linked to a protected characteristic.¹⁶ So far, the bills have generally died in committee, but many have been reintroduced.¹⁷ These repeated attempts reflect an expanding national dialogue as to the boundaries of unacceptable behavior in the workplace.

The legislation introduced at the state level, based on the model Healthy Workplace Bill, has been fairly consistent from state to state. The bills generally define abusive conduct 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."¹⁸ To evaluate a complaint raised under this legislation, the bills mandate consideration of the "severity, nature and frequency" of the offending behavior.¹⁹ Typically a single incident would not merit a legitimate abusive workplace complaint unless it was "especially severe and egregious."²⁰ Much like the affirmative defenses available under Title VII and California's Fair Employment and Housing Act (FEHA), after exercising "reasonable care" to prevent bullying in the workplace,²¹ an employer's liability depends on the extent to which the offended employee makes his or her employer aware of the abusive conduct, and whether the employer takes prompt remedial action.²²

In California, the concept of enforcing civil behavior in the workplace is slowly gaining traction at the local level. In January 2007, San Francisco's Board of Supervisors passed the San Francisco Healthy Workplace Resolution, in which the Supervisors condemned abusive workplace behavior and directed the Department of Human Resources to inform them about whether "mobbing"²³ and other forms of psychological harassment could be covered by existing policies that prohibit workplace harassment.²⁴ Similarly, in 2006, the City of Berkeley's Commission on Labor proposed a draft Anti-Bullying Proclamation after conducting several workshops regarding workplace bullying.²⁵

Proponents of the legislation say that it is high time for anti-bullying legislation. They cite to the fact that bullying is not illegal and, as a result, employers are more prone to ignore such behavior, especially if the jerk is a high performer.²⁶ Supporters further emphasize that bullying has become an acceptable part of the work environment due to increased stress and work demands and that anti-bullying legislation is a way of addressing this unhealthy trend.²⁷

Opponents view the anti-bullying legislation as redundant, overbroad and too subjective.²⁸ They emphasize that existing laws and internal workplace anti-harassment policies are sufficient.²⁹ In a company with a broad anti-harassment policy, there should be little difference from a human resources perspective in how an employer responds to a complaint of bullying versus discriminatory harassment.³⁰

ATTEMPTS TO COMPEL CIVIL BEHAVIOR THROUGH TITLE VII AND FEHA

Since its passage in 1964, Title VII has offered employees legal recourse in the face of discriminatory harassment in the workplace, and the FEHA has offered expanded protection since 1980.³¹ Presently, whether bullying behavior is actionable under Title VII or the FEHA depends on the type of conduct, whether it is directed at a protected characteristic of an employee and how frequently the conduct occurs.

Title VII provides:

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.³²

In *Oncale*, the United States Supreme Court held that Title VII not only covers "terms" and "conditions" of employment in the narrow contractual sense, but "evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment."³³ The Court concluded "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult

that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated."³⁴

Rude and bullying behavior can lead to a "hostile work environment" claim if the behavior can be linked to a protected characteristic, particularly if the employer ignores the bullying behavior. As the Sixth Circuit stated,

[a]ny unequal treatment of an employee that would not occur but for the employee's gender [or other protected characteristic], may, if sufficiently severe or pervasive . . . constitute a hostile work environment in violation of Title VII.³⁵

Protected characteristics include sex, race, color, ancestry, religious creed, national origin, physical disability (including HIV and AIDS), mental disability, medical condition, age, marital status, Vietnam-era or disabled veteran status, military service, pregnancy, childbirth or related medical conditions, political activity and both actual and perceived sexual orientation.³⁶

While the *Oncale* Court opined that prohibiting discrimination in the workplace can be distinguished from general incivility,³⁷ as noted by the Second Circuit, it can be difficult to parse this threshold issue when "everyone can be characterized by sex, race, ethnicity or (real or perceived) disability."³⁸

In *Singleton v. United States Gypsum Co.*, rude and offensive coworker conduct that arguably could have been characterized as workplace bullying passed this threshold for the California Court of Appeal.³⁹ Plaintiff John Singleton, a maintenance mechanic at United States Gypsum Company, presented substantial evidence that his coworkers "insulted him, spoke rudely to him, interfered with his maintenance work, deliberately sabotaged machine operations and taunted him while he tried fruitlessly to troubleshoot problems[.]"⁴⁰ In granting summary judgment for the employer, the trial court found that the coworkers' behavior was hostile and abusive, but unrelated to Singleton's gender or sexual orientation.⁴¹

The appellate court disagreed. Singleton had specifically alleged that two coworkers repeatedly called him "Sing-a-

ling," which he and others believed was a reference to a homosexual character played in a movie by actor Bernie Mac. Singleton also alleged that these coworkers continuously taunted and harassed him by making gestures and comments pertaining to oral and anal sex.⁴² The court of appeal overturned the grant of summary judgment, finding that there were triable issues of fact as to whether Singleton was harassed because of his gender.⁴³

In other cases that straddle the fence between nonactionable workplace bullying and actionable harassment, the protected status may be clear; however, the cases often pivot on the "equal opportunity jerk" defense. As the Ninth Circuit held in 1994, evidence that a harasser is abusive to all employees is insufficient by itself to support a conclusion that harassing conduct is not based on a protected trait, because the degrading conduct towards other employees does not "cure" the conduct towards those in the protected status.⁴⁴ Even so, evidence of the harasser's behavior towards other employees is often relevant.

In 2005 the Ninth Circuit found that an alleged equal opportunity jerk's behavior was distinguishable based on evidence of qualitative and quantitative differences in harassment suffered by male and female employees.⁴⁵ In *EEOC v. National Education Association, Alaska*, a supervisor frequently shouted in a loud, hostile and profane manner at female employees and physically intimidated them.⁴⁶ This behavior caused the women to feel physically threatened, cry and experience panic attacks.⁴⁷ The employer contended that the supervisor acted in the same manner towards male employees and proffered evidence that he was physically intimidating to at least one male employee, who suffered a similar reaction as the female employees. However, the male employees generally considered the supervisor's behavior to be male bantering. The court found there was a "debatable question as to the objective differences in treatment of male and female employees," concluded the subjective differences were very significant and substantial, and ruled the case should go to a jury.⁴⁸

By contrast, the Seventh Circuit held in *Gleason v. Mesriow Financial* that the equal opportunity harasser's conduct was not sufficient to sustain a cause of action for hostile work environment.⁴⁹ Plaintiff Lori Gleason's supervisor was an equal

opportunity jerk: male and female coworkers described him as an unprofessional, overbearing jerk whose offensive behavior included "yelling, slamming down the phone, making nasty comments about clients, [and] talking down to his fellow workers[.]"⁵⁰ Gleason was one of many employees who complained to management of the supervisor's obnoxious conduct.⁵¹ She did not raise specific allegations of sexual harassment while she was employed; however, Gleason brought suit after being terminated for performance issues, claiming that she had been subjected to hostile work environment sexual harassment.⁵²

Gleason alleged two specific incidents by the bullying supervisor with sexual overtones: on one occasion he told her he had spent the weekend at a nudist camp; on another occasion he told Gleason he had dreamt of holding hands with her.⁵³ In upholding summary judgment, the court deemed it critical to distinguish between an unpleasant working environment and a hostile one.⁵⁴ Title VII, it held, was "not designed to purge the workplace of vulgarity," and "a certain amount of vulgar banter" is inevitable in the modern workplace, particularly from "coarse and boorish workers."⁵⁵ The court upheld the trial court's grant of summary judgment on the ground that the alleged harassing incidents Gleason cited did not rise to the level of actionable harassment.⁵⁶

OTHER AVENUES FOR REDRESS

Tort Causes of Action

Plaintiffs have attempted to seek redress against bullies in the workplace through tort causes of action—primarily through the tort of intentional infliction of emotional distress. The prevailing trend has been for courts to dismiss such cases because the alleged behavior is not extreme or outrageous enough to meet the requirements of the tort.⁵⁷

In a recent case in Indiana, plaintiff, a perfusionist (an operator of the heart/lung machine that keeps a patient alive during open-heart surgery), brought suit against a doctor for assault, intentional infliction of emotional distress and intentional interference with his employment relationship based on an alleged bullying incident.⁵⁸ The suit arose after the plaintiff and doctor got into a heated

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.)²

- **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).

- affect the conditions of employment).
38. *Alfano v. Castello*, 294 F.3d 365, 377 (2d Cir. 2002) (personnel decisions with no linkage to claimed protected status excluded; courts are not in the business of second-guessing personnel decisions [citing *Simms v. Oklahoma, ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1330 (10th Cir. 1999)]).
 39. *Singleton v. United States Gypsum Co.*, 140 Cal. App. 4th 1547 (2006).
 40. *Id.* at 1556.
 41. *Id.*
 42. *Id.* at 1552–53.
 43. *Id.* at 1564.
 44. *Steiner v. Showboat Operating Co.*, 25 F.3d 1459 (9th Cir. 1994). In *Steiner*—a sexual harassment case—while the supervisor was abusive to men, the abusive conduct towards female employees was found to be obviously and explicitly gender specific.
 45. *EEOC v. Nat'l Educ. Ass'n, Ala.*, 422 F.3d 840 (9th Cir. 2005).
 46. *Id.* at 843–44.
 47. *Id.* at 844–45.
 48. *Id.* at 846.
 49. *Gleason v. Mesirov Fin.*, 118 F. 3d 1134 (7th Cir. 1997).
 50. *Id.* at 1136.
 51. *Id.*
 52. Gleason also alleged causes of action for pregnancy discrimination and retaliatory discharge. *Id.* at 1135.
 53. *Id.* at 1145.
 54. *Id.* at 1144.
 55. *Id.* at 1144 (internal citations omitted).
 56. *Id.* at 1146.
 57. David Yamada has written extensively on the use of tort law as a theory for recovering for emotionally abusive treatment in the work place. David Yamada, *Potential Legal Protections and Liabilities for Workplace Bullying*, New Workplace Institute June 2007 and David Yamada, THE PHENOMENON OF 'WORKPLACE BULLYING' AND THE NEED FOR STATUS-BLIND HOSTILE WORK ENVIRONMENT PROTECTION, 88 GEO. L.J. 475 (March 2000); see *Denton v. Chittendon Bank*, 655 A.2d 703 (Vermont 1994) (liability should not be extended for a series of indignities, where one episode did not amount to an act of "extreme humiliation").
 58. *Raess v. Doescher*, 858 N.E.2d 119 (Ind.App. 2006). The claim for interference with an employment relationship was dismissed on summary judgment; the remaining claims went to a jury. *Id.*
 59. *Id.* at 121.
 60. *Id.* at 122.
 61. *Id.* at 123.
 62. The ADA prohibits employment discrimination against those "qualified individual[s] with a disability because of the disability." 42 U.S.C. § 12101 et seq.
 63. 101 F.3d 519, 522 (7th Cir. 1996).
 64. *Id.* at 526–27. See also, *Dewitt v. Carsten*, 941 F.Supp. 1232 (N.D. Ga. 1996) (jail sergeant's claimed disability was extreme stress triggered by her boss, the Sheriff, having yelled at her on one occasion, and by having to deal with inmates on a daily basis; court found this "very flexible" condition did not qualify as a disability); *Schneiker v. Fortis Ins. Co.*, 200 F.3d 1055 (7th Cir. 2000) (although no overt evidence submitted that supervisor was a bully, plaintiff's claimed disability of depression only caused her to be unable to work under the supervision of one particular supervisor).
 65. *Verga v. Workers' Comp. Appeals Bd.*, 159 Cal. App. 4th 174, 178 (2008) (citing Labor Code § 3208.3(b)(1)).
 66. *Id.* Psychiatric injuries arising from nondiscriminatory, good faith personnel decisions do not qualify for compensation. See Labor Code § 3208.3(h).
 67. *Id.* at 185 (quoting *Pacific Gas & Electric Co. v. Workers' Comp. Appeals Bd.*, 114 Cal. App. 4th 1174, 1181–82 (2004)).
 68. *Wrenn v. Gould*, 808 F.2d 493, 500 (6th Cir. 1987).
 69. *Id.* See *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028 (2005).
 70. *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006). *Vasaherlyi v. New Sch. for Social Research*, 230 A.D.2d 658 (N.Y. App.Div. 1996) (claim for intentional infliction of emotional distress reinstated after whistleblower demonstrated the president's actions subsequent to the revelation of wrongdoing were sufficient to amount to intentional conduct that resulted in emotional distress).
 71. In 2007, California's Fair Employment and Housing Commission promulgated revised regulations for its Sexual Harassment Training and Education. These regulations interpret Government Code section 12950.1 (AB 1825), which requires sexual harassment training for supervisors of employers with fifty or more employees. Provided by qualified trainers or educators, the training must cover: (1) what are unlawful harassment, discrimination, and retaliation under both federal and state law; (2) what steps to take when harassing behavior occurs in the workplace; (3) how to report complaints of harassment; (4) how to respond to a complaint of harassment; (5) the employer's obligation to conduct an investigation; (6) what constitutes retaliation and how to prevent it; (7) the essential components of an anti-harassment policy; and (8) the effect of harassment on the workplace. Two hours of training must be provided once every two years. CAL. CODE REGS. tit. 2, §. 7288.0(a)(9), (11) and (b) (2007).

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