

## The Schoolyard Bully Comes to the Workplace

*By David S. Katz, Esq.*

**M**any of us remember the experiences of junior and senior high school with mixed emotions. It is supposed to be a relatively carefree time of academic learning and social exploration. Unfortunately, this is also a time when many children suffer from the unbearable cruelty and often relentless humiliation perpetrated by the schoolyard bully often rendering them afraid, depressed and emotionally scarred. Bullying behavior, sadly, does not end as we leave school. Often it finds another venue - the workplace.

Workplace bullying has existed since the dawn of employment according to most psychologists and human resource experts. In the workplace, the bullied person is not the stereotypical oddball or loner. He or she is, in fact, an employee who is a well-liked highly capable and dedicated staff member with a non-confrontational interpersonal style. The bully generally perceives such a co-worker as a threat and then seeks to minimize their importance.

Bullying has been defined as repeated, unreasonable behavior directed toward an employee or group of employees that creates a risk to health and safety. Examples of bullying are verbal abuse, exclusion or isolation, deliberate and unwarranted changes to work rosters, holding back of necessary information and giving impossible jobs or tasks to an employee knowing that it cannot be accomplished. "Mobbing" in the workplace is a group bullying phenomenon manifested through innuendo, humiliation, ostracism and intimidation.

Countries such as England and Ireland have taken proactive legislative and governmental steps toward solving this problem. Awareness about the effects of bullying conduct in the workplace is growing in the United States and Canada. In fact, legislation is currently pending in California, Oregon and Massachusetts that would make bullying a specific and separate basis for harassment and discrimination under state statute.

The American legal system to date, unlike its European counterparts, has been hesitant to legislate manners or civility in the workplace (outside of civil rights laws) but this attitude may change as the problem becomes more recognized and the price tag for ignoring the problem becomes larger. To this point, workers besieged by either bullying or mobbing have sought refuge under Title VII of the Civil Rights Act of 1964. This Act, among other things, permits relief for protected classes based on a "hostile work environment" theory. A hostile work environment has been defined as a situation where the workplace is so permeated with "discriminatory intimidation, ridicule and insult" that it otherwise alters the conditions of the victim's employment and creates an abusive working environment.

Even under current law, which is in a state of flux, employers should be especially vigilant to make sure that individuals targeted by bullies are not members of protected classes who might be able to establish claims against an employer under existing discrimination laws. Federal courts have not yet extended the hostile workplace doctrine to prohibit workplace bullying conduct based on characteristics other than those specifically enumerated in Title VII, but history suggests that, in the future, there will be an expansion of protection to those who suffer the results of this conduct.

In the interim, the preferred avenue for workers seeking relief for abusive treatment in the workplace has been the state common law tort claim of intentional infliction of emotional distress. An employer may be held liable under such common law theories if it knows of the bad acts and takes no action to stop bullying conduct. As well, state worker's compensation statutes also impose indirect liability on employers by requiring compensation to employees for harm done to them by co-workers in the scope of their employment. Other avenues presently sought by aggrieved employees have included negligence for failing to maintain a safe workplace, negligent infliction of emotional distress and/or negligent hiring or retention against an employer for damages suffered by an employee due to the acts of another employee. As well, courts have consistently recognized general incidents of co-worker abuse that are not otherwise discriminatory as potential evidence of unlawful discrimination or harassment.

The case for strict anti-bullying policies is compelling. Potential benefits include a more peaceful and productive workplace with better decision making, less time lost to sick leave or self-defensive paperwork, higher staff retention and a significantly lower risk of the cost of legal action. Companies must start to identify bullying in employee handbooks as unacceptable behavior, treating it no differently than sexual harassment or racial discrimination. To this end, we suggest that employers "get ahead of the curve," and begin to employ affirmative rules and regulations governing such behavior, as follows:

1. **Establish an anti-bullying/mobbing policy** defining specifically what bullying is and providing common sense descriptions of acceptable and unacceptable behavior at work. Included in such a policy should be a statement that the company supports the rights of all employees to work in an environment free from bullying. This will give targeted individuals a context and a constructive way to confront bullying tactics.
2. **Conduct climate surveys to uncover bullying behavior** provided that these surveys are sent to a neutral third party for review and that confidentiality is guaranteed.
3. **Establish reporting, investigation and mediation processes** guaranteeing all those who avail themselves of these processes and that there will be no retaliation against them. Because bullying is often duplicitous and difficult to detect, it can be risky for others to complain. This is especially true in situations where the bullying has become mobbing and is thus more part of the organizational culture of the company. Rather than fight the "mob," many talented employees move on to a new and healthier workplace. Therefore, a clear statement and enforcement of an anti-retaliation policy is essential and
4. **Train all employees** to ensure that everyone is aware of his or her responsibility to conduct themselves in a professional and businesslike manner. Employees should be taught how to recognize the first signs of bullying/mobbing mentality. Companies should adopt a "zero-tolerance" policy for such behavior.

Bullying has no place in the schoolyard or in any well managed corporation.

For further information on this timely subject, please feel free to call or e-mail us.