



Beyond the Locker Room: Bullying in the Workforce

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Your Presenters

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In the Locker Room

- ESPN reported the following voicemail transcription on Nov. 10, 2013 from a veteran lineman to a rookie: Hey, wassup, you half n---- - piece of s---. I saw you on Twitter, you been training 10 weeks. [I want to] s--- in your f---ing mouth. [I'm going to] slap your f---ing mouth. [I'm going to] slap your real mother across the face [laughter]. F--- you, you're still a rookie. I'll kill you.



In the Locker Room

- Texts from the veteran to the rookie included derogatory terms for female anatomy and sexual orientation
- Rookie left the team and has not returned
- Veteran suspended, appealing
- Investigation underway by Ted Wells (defense lawyer) - reportedly to be released in the next few weeks
- New York Times reported Dec. 11, 2013 that NFL players should expect rule changes regarding behavior in locker rooms and with teammates.

2013
OFFICIAL
PLAYING RULES
OF THE
NATIONAL
FOOTBALL LEAGUE



Is Bullying the Next Big Thing?

- In our hyper-sensitive, rights-focused society, should employers prepare for battle on a new front?
- Is bullying a societal problem crying out for a cure or just another headache for employers?
- In this presentation, we will discuss the development of the case against bullying, the specter of new legislation and lawsuits asserting workplace bullying, and how employers should prepare to deal with this developing area of the law.

Bullying in the News



ESSENCE

Forbes

WORKING
MOTHER



- AARP(Nov. 2013): What to Do If You Are Bullied At Work
- Essence (Nov. 2013): How to Fight Bullying At Work
- Forbes (9/20/13) How to Deal with a Bullying Boss
- Washington Post (5/28/12): Dealing with Bullies in the Workplace
- Working Mother.com (December/January 2012): Workplace Bullies
- Delta Kappa Gamma Bulletin (Winter 2011): Workplace Bullying: Costly and Preventable
- New York Times (5/9/10): Backlash: Women Bullying Women at Work

The Delta Kappa Gamma Bulletin
International Journal for Professional Educators

The New York Times

Common Bullying Anecdotes

- Schools
- Sports teams
- Sororities/Fraternities
- Kitchens
- Military
- Locker Rooms

Anti-Bullying Organizations

- Easily identified in Google searches
- Encourage broad definitions of bullying
- Studying bullying based on their own (varying) definitions
- Increase focus/awareness



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Non-Legal Definitions: Example Behaviors “Used in Bullying”

- Employees included the following behaviors as “bullying”:
 - Lack of feedback
 - Reprimands
 - Denial of promotion without valid reason
 - Targeted by rumors/gossip
 - Refused assistance
 - Withholding needed information
 - Silent treatment

Source: Workplace Stress and Aggression Project within U.S. Dept. of Veteran Affairs (VA Project)

Non-Legal Definitions: Types of Bullies

- Workplace Bullying Institute has identified four categories of bullies:
 - Constant critic
 - Two-headed snake
 - Gatekeeper
 - Screaming

Bullying Survey

- Workplace Bullying Institute U.S. Workplace Bullying Survey - 2010
 - Online survey of over 2000 U.S. workers
 - Updated similar study done in 2007
 - Experience with specified types of mistreatment
- Key Claims
 - 54 million people (37% of workers) have been bullied at work
 - Bullying affects half of American adults (71.5 million workers)
 - Bullying is 4 times more prevalent than illegal forms of harassment
 - In 62% of cases, employers worsen the problem or do nothing
 - Despite losing 21-28 million workers because of bullying
 - 72% of bullies are bosses, and 55% of those bullied are rank-and-file workers
 - Women are targeted more frequently, particularly when the bully is another woman
 - 3% of bullied targets file lawsuits, 40% never complain

Survey Results

- At work, what is your experience with any or all of the following types of repeated mistreatment: sabotage by others that prevented work from getting done, verbal abuse, threatening conduct, intimidation or humiliation?

CATEGORY	2007	2010
Currently Bullied	12.6	8.8
Been Bullied, Not Now	24.2	25.7
Total: Bullying Experienced	36.8	34.5
Witnessed Only	12.3	15.5
Total: Bullying Recognized	49	50
Not Bullied/Not Witnessed	44.9	49.6

Survey Results: Gender

- Targets
 - 58% women
 - 42% men
- Perpetrators
 - 62% men
 - 38% women

Targets	Perpetrators	
	Men	Women
Men	34%	8%
Women	28%	30%

- Men bullies target men in 55.5% of cases, women in 45.5%
- Women bullies target women in 79.8% of cases (up from 71% in 2007)

Survey Results: Race

Race	Bullied Now	Been Bullied	Combined	Witnessed Only	No Bullying Experience
Hispanics	12.7%	23.5%	40.2%	12.3%	51.4%
African-Americans	11%	27.6%	38.6%	7.9%	51.5%
Whites	7.9%	25.7%	33.6%	16.8%	49.6%
Asians	3.8%	9.7%	13.5%	37.6%	48.9%
National Prevalence	8.8%	25.7%	34.5%	15.5%	49.6%

Survey Results: Age

Bullying Experience	Ages 18-29	Ages 30-49	Ages 50-64
Currently Bullied	27%	50%	23%
Been Bullied, Not Now	22%	47%	30%
Witnessed Only	29%	49%	22%
Not Bullied/Not Witnessed	23%	48%	30%

Age Group	Currently Bullied	Been Bullied, Not Now	Witnessed Only	Not Bullied/Not Witnessed
18-29	11%	25%	20%	44%
30-49	11%	26%	16%	47%
50-64	9%	30%	13%	48%
Full National Sample	8.8%	25.7%	15.5%	49.6%

Reported Impacts on Employees

- Physical and psychological trauma
 - Associated with Post-Traumatic Stress Disorder
 - Loss of sleep (fatigue)
 - Burn-out
 - Anxiety
 - Frustration
 - Lowered self-esteem and efficacy
 - Shame, embarrassment, guilt
 - Suicide
- Ill health
 - Stress headaches
 - Digestive problems, ulcers
 - Clinical depression
 - Increased risk of heart disease
 - Musculoskeletal disorders
 - Increased blood pressure
 - Immunological impairment
 - Fibromyalgia
 - Chronic fatigue syndrome



CURRENT APPROACHES IN U.S. LAW

How have the courts viewed these cases?

- What lessons can employers learn?
- What causes of action are employers likely to face?

Federal Law

- Does not directly address bullying
- Harassment Complaints
 - Title VII
 - “Title VII is not a civility code.” *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998)
 - Disparate treatment
 - Disparate impact
 - Age Discrimination in Employment Act
 - Americans with Disabilities Act
 - Offending behavior exacerbates or creates a disability
- Defense: “equal opportunity bully”

Title VII Harassment Cases

- “Mere workplace bullying is not enough to give rise to an actionable hostile work environment claim...there must be a showing the conduct occurred because of...membership in a protected class.” *De la Cruz v. NYC*, 738 F. Supp. 2d 622 (2011)
- *Yancick v. Hanna Steel Corp.*, 653 F.3d 532 (2011) - court described black coworker as a “workplace bully” - confrontational, rude, and disruptive. White plaintiff was severely and permanently injured when coworker dropped a 940 pound steel coil on him and alleged this was because of his race.
- *Vito v. Bausch & Lomb, Inc.*, 403 Fed. Appx. 593 (2010) - alleged conduct included abusive language, gender-related jokes, occasional teasing, bullying, inappropriate physical conduct.
- *Walker v. Sullair Corp.*, 736 F. Supp. 94 (W.D.N.C. 1990) *rev’d in part and aff’d in part*, 946 F.2d 888 (4th Cir. 1991) - alleged conduct included close monitoring of plaintiff, including of personal phone calls, public reprimands for poor job performance, and various other nonsexual harassment by a superior with whom the plaintiff once had a consensual sexual relationship.
- *Turley v. Union Carbide Corp.*, 618 F. Supp. 1438 (S.D. Va. 1985)- alleged conduct include being picked on all the time and being treated differently from male employees, harassment of a nonsexual nature.

Hypothetical? Some Background Facts

- Staff Assistant at Department of Labor
- Applied for and denied a promotion
- Alleged her supervisor added unnecessary qualifications to prevent her from qualifying
- “Effective” performance rating, no bonus
- No mid-year appraisal
- Supervisor yelled at her and required her to put post-its on her desk when she was away

Hypothetical: Possible Causes of Action?

- Count 1: Disparate impact related to the qualifications
- Count 2: Retaliation for complaining about failure to promote related to performance evaluation and bonus
 - (abandoned by plaintiff)
- Count 3: Retaliatory hostile work environment for challenging failure to promote by subjecting to “constant yelling” and post-it instruction
- Count 4: “Workplace bullying” due to constant yelling

Hypothetical: Motion for Judgment on the Pleadings

Ramseur v. Perez, ___ F. Supp. 2d ___, 2013 WL 4483511 (D. D.C. Aug. 23, 2013)

- Count 1 (Disparate impact):
 - Allowed to proceed

- Count 3 (Retaliatory hostile work environment):
 - Allowed to proceed

- Count 4 (Workplace bullying):
 - Dismissed because “workplace bullying is not an independently cognizable claim under Title VII” but
 - Allegations rolled into Count 3
 - Attempted reliance on *Raess v. Doescher* (Ind. 2008)
- Lesson learned: these cases sometimes have staying power

State Law Claims

- Overlap with discrimination, harassment, retaliation from federal law
- Tort Claims
 - Physical violence
 - Battery
 - Assault
 - Psychological harm
 - Intentional infliction of emotional distress
 - Negligent infliction of emotional distress
 - Intentional interference with contract/employment relationship
- Whistleblower protection
- Workers' Compensation (if can show partial or full incapacitation)
- Occupational Health and Safety Statutes
 - Initially focused on physical safety
 - Has begun including bullying in its recent studies of workplace violence and aggression

IIED Cases

- *Turnbull v. Northside Hospital*, 470 S.E.3d 464 (Ga.1996) - alleged conduct included “glaring at plaintiff with purported anger and contempt, crying, slamming doors, snatching phone messages from plaintiff’s hand.” Court described it as “childish and rude” but “not the type of behavior for which the law grants a remedy” noting the absence of cursing, derogatory remarks about the plaintiff, and verbal and physical threats.
- *Denton v. Chittenden Bank*, 655 A.2d 703 (Vt. 1994) - conduct alleged included “an insulting, demeaning, and vindictive course of conduct” toward plaintiff that included “ridicule, invasions of privacy, intentional interference with ability to car pool, competitiveness in after-work sports, and an unreasonable workload.” Court noted that this was a “series of indignities” that did not result in liability.
- *Holloman v. Keadle*, 931 S.W.2d 413 (Ark. 1996) - alleged conduct included cursing, referring to plaintiff with offensive terms such as “white n*gger,” “slut,” “whore,” and “the ignorance of Glenwood, Arkansas.” Defendant repeatedly used profanity, remarked that women working outside the home were “whores and prostitutes,” mentioned his connections to the mob and that he carried a gun in order to “intimidate her and to suggest he would have her killed if she quit or caused trouble. Plaintiff allegedly suffered “stomach problems, loss of sleep, loss of self-esteem, anxiety attacks, and embarrassment.” Summary judgment in favor of defendant upheld.

Raess v. Doescher, 883 N.E.2d 790 Ind. 2008

- Plaintiff - hospital operating room perfusionist
- “Verbal altercation” with surgeon outside the open heart surgery area in the hospital
- Failed to return to work following the altercation, claiming to be afraid
 - Defendant argued it was due to his “own stubborn pride”
- Difficulties after the altercation:
 - emotional response
 - lack of focus
 - lack of confidence
 - inability to make split-second decisions
 - major depressive disorder with anxiety and panic disorder
- Court permitted testimony by expert in workplace bullying: “I concluded that based on what I heard and what I read that [the defendant] is a workplace abuser, a person who subjected [the plaintiff] to an abusive work environment. It was a horrific day, it was [a] particularly aggregous [sic], outrageous . . . episode.”
- Query: Is this really an area for expert testimony? What scientific standards apply?

Raess v. Doescher, 883 N.E.2d 790 Ind. 2008

- Claims:
 - Tortious interference with employment (dismissed on partial summary judgment)
 - Assault
 - IIED
- Defendant - just the surgeon, not the hospital

- At Trial:
 - Plaintiff's verdict on assault
 - Defense verdict on IIED

- Results undisturbed on appeal
- Dissent noted there is no such tort as workplace bullying and the term has "no legal definition"
- Query: If there is no legal definition, how can there be a cause of action?

Bullying Legislation

- Legislatures across the country are attempting to address bullying
- How are they defining bullying?
 - Schools
 - Workplace

School Based Bullying Laws: Broad Definitions

- **North Carolina:** N.C. Gen. Stat. § 115C-407.15(a) (2010): "Bullying or harassing behavior includes, but is not limited to, acts reasonably perceived as being motivated by any actual or perceived differentiating characteristic, such as race, color, religion, ancestry, national origin, gender, socioeconomic status, academic status, gender identity, physical appearance, sexual orientation, or mental, physical, developmental, or sensory disability, or by association with a person who has or is perceived to have one or more of these characteristics."
- **Washington:** Wash. Rev. Code Ann. § 28A.300.285.2 (2010): "Nothing in this section requires the affected student to actually possess a characteristic that is a basis for the...bullying."
- **Florida:** Fla. Stat. Ann. 1006.147(3) (2010): "(a) 'Bullying' means systematically and chronically inflicting physical hurt or psychological distress on one or more students and may involve: (1) Teasing; (2) Social exclusion; (3) Threat; (4) Intimidation; (5) Stalking; (6) Physical violence; (7) Theft; (8) Sexual, religious, or racial harassment; (9) Public humiliation; or (10) Destruction of property. . . . (d) The definitions of 'bullying' and 'harassment' include: (1) Retaliation against a student or school employee by another student or school employee for asserting or alleging an act of bullying or harassment...[and] (2) Perpetuation of [bullying or harassing] conduct ... by an individual or group with intent to demean, dehumanize, embarrass, or cause physical harm to a student..."
- **Kansas:** Kan. Stat. Ann. § 72-8256.C.2 (2009): "'Cyberbullying' means bullying by use of any electronic communication device through means including, but not limited to, e-mail, instant messaging, text messages, blogs, mobile phones, pagers, online games and websites."

Healthy Workplace Bill

- Designed to make non-status-related harassment (bullying) actionable under state law
- Proposed Legislative Findings:
 - Link social and economic well-being to “healthy and productive employees”
 - Incorporate survey findings that between 37 and 59 percent of employees directly experience health-endangering workplace bullying, abuse, and harassment
 - List “serious harm” that “workplace bullying, mobbing, and harassment” can inflict including feelings of shame and humiliation, severe anxiety, depression, suicidal tendencies, impaired immune systems, hypertension, increased risk of cardiovascular disease, and symptoms consistent with post-traumatic stress disorder
 - Also list serious consequences for employers, including reduced employee productivity and morale, higher turnover and absenteeism rates, and increases in medical and workers' compensation claims
 - Note failure of law to address non-status-related bullying

Healthy Workplace Bill

- **Proposed Definitions:**
- **Abusive work environment.** An abusive work environment exists when the defendant, acting with malice, subjects an employee to abusive conduct so severe that it causes tangible harm to the employee.
- **Abusive conduct.** Abusive conduct is conduct, including acts, omissions, or both, that a reasonable person would find hostile, based on the severity, nature, and frequency of the defendant's conduct. Abusive conduct may include, but is not limited to: repeated infliction of verbal abuse such as the use of derogatory remarks, insults, and epithets; verbal or physical conduct of a threatening, intimidating, or humiliating nature; the sabotage or undermining of an employee's work performance; or attempts to exploit an employee's known psychological or physical vulnerability. A single act normally will not constitute abusive conduct, but an especially severe and egregious act may meet this standard.
- **Malice.** Malice is defined as the desire to cause pain, injury, or distress to another.
- **Tangible harm.** Tangible harm is defined as psychological harm or physical harm.
- **Psychological harm.** Psychological harm is the material impairment of a person's mental health, as established by competent evidence.
- **Physical harm.** Physical harm is the material impairment of a person's physical health or bodily integrity, as established by competent evidence.

Healthy Workplace Bill

- **Proposed Unlawful Employment Practices:**
- (a) Abusive Work Environment. It shall be an unlawful employment practice under this Chapter to subject an employee to an abusive work environment as defined by this Chapter.
- (b) Retaliation. It shall be an unlawful employment practice under this Chapter to retaliate in any manner against an employee who has opposed any unlawful employment practice under this Chapter, or who has made a charge, testified, assisted, or participated in any manner in an investigation or proceeding under this Chapter, including, but not limited to, internal complaints and proceedings, arbitration and mediation proceedings, and legal actions.

Healthy Workplace Bill

- **Proposed Employer Liability and Defense:**
- (a) An employer shall be vicariously liable for an unlawful employment practice, as defined by this Chapter, committed by its employee.
- (b) Where the alleged unlawful employment practice does not include an adverse employment action, it shall be an affirmative defense for an employer only that:
 - (1) the employer exercised reasonable care to prevent and correct promptly any actionable behavior; and,
 - (2) the complainant employee unreasonably failed to take advantage of appropriate preventive or corrective opportunities provided by the employer.

Healthy Workplace Bill

- **Proposed Employee Liability and Defense*:**
- (a) An employee may be individually liable for an unlawful employment practice as defined by this Chapter.
- (b) It shall be an affirmative defense for an employee only that the employee committed an unlawful employment practice as defined in this Chapter at the direction of the employer, under threat of an adverse employment action.

*Sometimes omitted from legislation when introduced

Healthy Workplace Bill

- **Proposed Affirmative Defenses:**
- It shall be an affirmative defense that:
 - (a) The complaint is based on an adverse employment action reasonably made for poor performance, misconduct, or economic necessity;
 - (b) The complaint is based on a reasonable performance evaluation; or,
 - (c) The complaint is based on a defendant's reasonable investigation about potentially illegal or unethical activity.

Healthy Workplace Bill

- **Proposed Relief:**

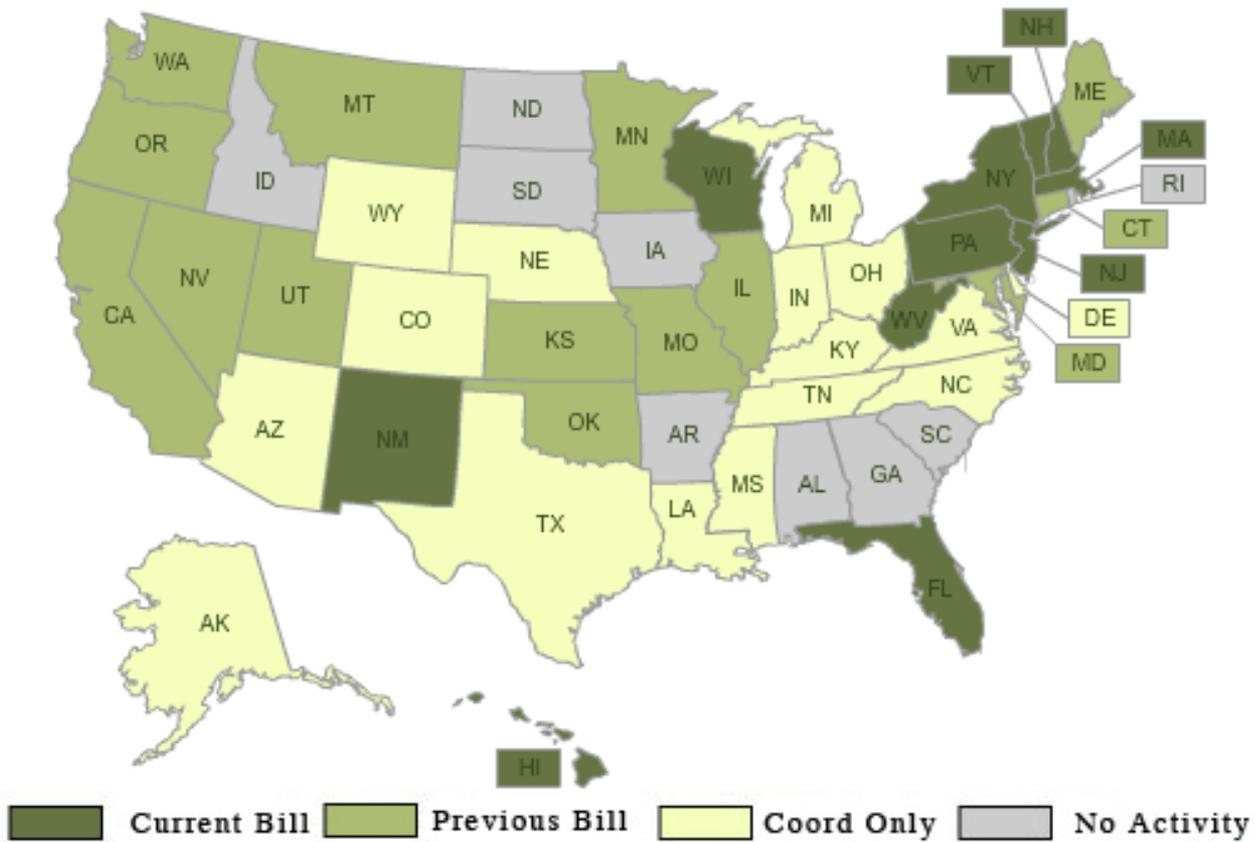
(a) Relief generally. Where a defendant has been found to have committed an unlawful employment practice under this Chapter, the court may enjoin the defendant from engaging in the unlawful employment practice and may order any other relief that is deemed appropriate, including, but not limited to, reinstatement, removal of the offending party from the complainant's work environment, back pay, front pay, medical expenses, compensation for emotional distress, punitive damages, and attorney's fees.

b) Employer liability. Where an employer has been found to have committed an unlawful employment practice under this Chapter that did not culminate in an adverse employment action, its liability for damages for emotional distress shall not exceed \$25,000, and it shall not be subject to punitive damages. This provision does not apply to individually named employee defendants.

- **Enforcement:**

- Private right of action
- One year statute of limitations

Pending Legislation: Healthy Workplace Bill



Credit: <http://www.healthyworkplacebill.org/>



INTERNATIONAL APPROACHES

International Approaches

- Expansion of Harassment definitions
- Expansion of Occupational Health and Safety Laws
 - Concept of a healthy workplace includes psychological and mental well-being of employees
- Common Law Claims
- EU's social partnership organizations

France

- “Moral harassment” law
 - One year in prison and/or 3750 euros (Labor Code)
 - One year in prison and 15,000 euros (Penal Code)



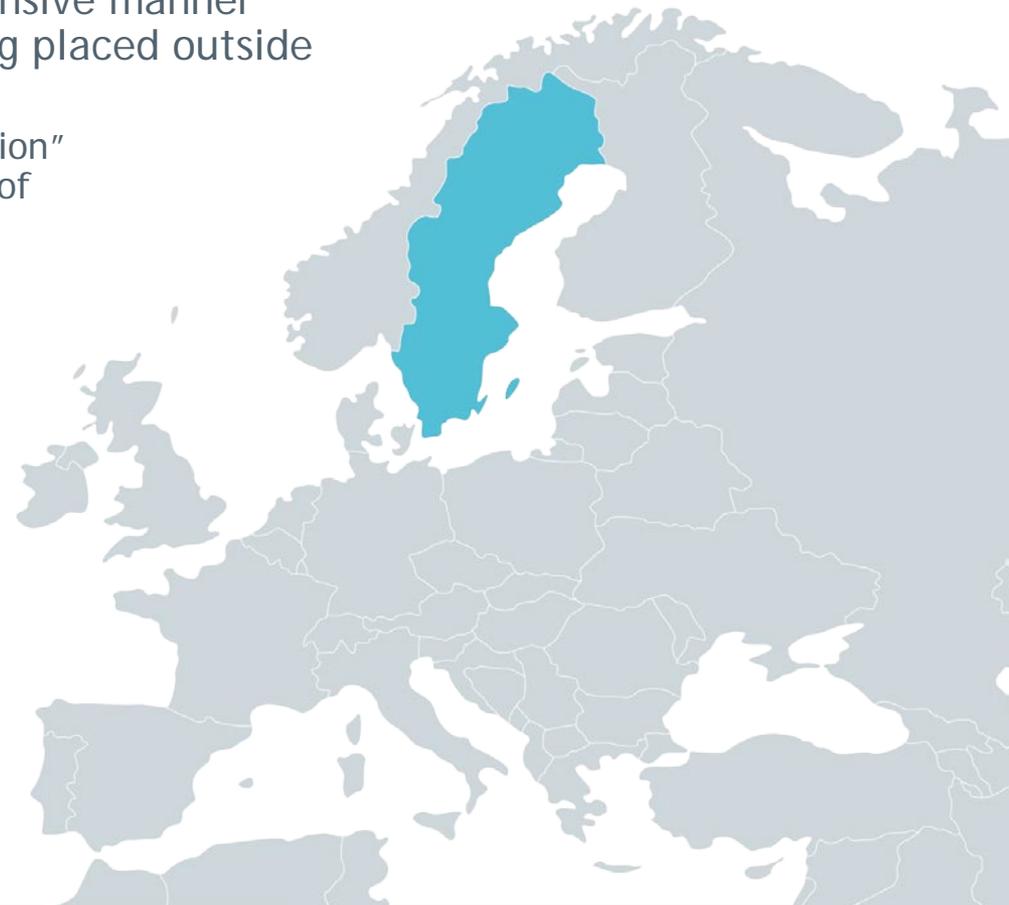
Canada

- Canada
 - Quebec
 - Bans “psychological harassment” defined as “vexatious behavior in the form of repeated and hostile or unwanted conduct...that affects an employee’s dignity or psychological or physical integrity and that results in a harmful work environment for the employee.”
 - Administrative complaint - equitable remedies or lost wages, punitive and “moral damages”
 - Saskatchewan
 - Amended its Occupational Health and Safety Act to expand harassment definition to include “inappropriate conduct, comment, display, action or gesture by a person that... adversely affects the worker’s psychological or physical well-being and that the person knows or ought to reasonably know would cause a worker to be humiliated or intimidated and that constitutes a threat to the health and safety of the worker.”
 - Fines (vary based on seriousness of conduct from \$2000 to \$300,000) or imprisonment



Sweden

- Ordinance on Victimization at Work (1993)- recurrent reprehensible or distinctly negative actions directed against individual employees in an offensive manner and can result in those employees being placed outside the workplace community
 - Guideline provisions explain “victimization” is a collective term for the phenomena of “adult bullying, mental violence, social rejection, and harassment”
 - Includes slandering an employee, deliberately withholding work-related information or supplying incorrect work information, deliberately sabotaging work performance, insulting ostracism, offensive “administrative penal sanctions”
 - No private cause of action



The image features a blue bokeh background with a central orange banner. The bokeh consists of numerous out-of-focus light spots in various shades of blue and white, creating a shimmering effect. The orange banner is a solid, horizontal band that spans the width of the image, providing a high-contrast background for the white text.

PROACTIVE SOLUTIONS FOR US EMPLOYERS

Reported Impact on Employers

- Decreased productivity
- Negative impact on creativity and innovation
- Increased absenteeism, presenteeism
- Decreased morale
- Disengagement/preoccupation
- Decreased effectiveness
- Retention problems
- Increased risk of workplace violence
- Fatigue-induced errors/accidents
- Litigation and settlement expenses
- Workers' compensation/disability
- Talent flight
- Negative PR - "worst place to work"
- Erosion of integrity
- Damaged customer relationships
- Increased risk of union activity

EMPLOYER ACTIONS

- Open door policy
- Directly address bullying behavior when it arises
- Create checks and balances to limit power of supervisors over subordinates
- Take seriously employee complaints about unfair treatment by bosses
- Consider expanding existing workplace violence or harassment policies to address bullying
- Consider implementing a policy specifically targeted at bullying
- Get engaged in state discussions on this legislation: make clear that vague and ambiguous laws will not help address this concern in a constructive way.
- Be leaders in promoting good HR practices that will help nip bullying in the bud.

Sample Anti-Bullying Policy

Proposed by the Washington State Department of Labor & Industries, adapted from the Commission of Occupational Safety and Health, Government of Western Australia

Company X considers workplace bullying unacceptable and will not tolerate it under any circumstances.

Workplace bullying is behavior that harms, intimidates, offends, degrades or humiliates an employee, possibly in front of other employees, clients, or customers. Workplace bullying may cause the loss of trained and talented employees, reduce productivity and morale and create legal risks.

Company X believes all employees should be able to work in an environment free of bullying. Managers and supervisors must ensure employees are not bullied.

Company X has grievance and investigation procedures to deal with workplace bullying. Any reports of workplace bullying will be treated seriously and investigated promptly, confidentially and impartially.

Company X encourages all employees to report workplace bullying. Managers and supervisors must ensure employees who make complaints, or witnesses, are not victimized.

Disciplinary action will be taken against anyone who bullies a coworker. Discipline may involve a warning, transfer, counseling, demotion or dismissal, depending on the circumstances.

The contact person for bullying at this workplace is:

Name: _____

Phone Number: _____

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