



Blurred Lines: Bullying Can Lead to Discrimination & Harassment Claims

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“Jerk”, “Moron”, “Idiot” (and far more colorful phrases) are words that every employee has heard in the workplace. Recognizing the impact this has on employees, California took a small step toward reducing bullying in the workplace by amending Government Code Section 12950.1 effective January 1, 2015. One recent survey of 4,000 workers from the art, entertainment and media industries found nearly half had been bullied, harassed, or discriminated against. No less than an Oscar winner recently recounted bullying on a film set that included her being told she was stupid, being ridiculed for sending a script to an actor, and refusing to forge documents.

The amendment requires California employers with 50 or more employees to provide its supervisors with training and education on “abusive conduct” in the workplace, in addition to the harassment prevention training that has been required since 2004.

Abusive conduct is defined by the statute as 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. The statute provides the following examples of abusive conduct:

- Repeated infliction of verbal abuse, such as the use of derogatory remarks, insults or epithets;
- Verbal or physical conduct that a reasonable person would find threatening, intimidating or humiliating;
- The gratuitous sabotage or undermining of a person’s work performance.

In using the term “gratuitous sabotage or undermining of a person’s work performance”, the legislature is trying to distinguish legitimate performance feedback from ridicule and abuse.

Importantly, the new law does not create a cause of action for workplace bullying. Yet, plaintiffs don’t see it that way. The line between bullying and the recognized causes of action for harassment and discrimination are often blurred. Currently, California law bans conduct that targets individuals in certain protected categories such as race, religion, gender, national origin, age, or disability in the workplace. Although being “mean” or a “bully” at work is not actionable, claims of bullying are likely to lead to claims that the bullying is motivated by a protected category.

Bullying’s impact goes far beyond just legal ramifications. Bullying can be toxic to morale and ruin productivity. Often bullied employees experience depression, anxiety, and other ailments. In one

notable case, an employee was reportedly ostracized by his boss. He made repeated complaints about his boss's behavior which apparently went unheeded. Shortly thereafter, the employee jumped from a tower killing himself. His suicide note implied workplace bullying was his motivation. In another case, a Missouri Dairy Queen worker was forced by his boss to lie on his stomach to clean the floor and if any food was made incorrectly he was pelted with a burger. This worker, too, committed suicide. In a twist, his boss was charged with involuntary manslaughter.

If an employee expresses his/her concerns of bullying to the employer, the behavior must be thoroughly investigated as you would any other complaint such as workplace violence or sexual harassment. The investigator must really break down the issues to determine if the complaint is legitimate workplace criticism or has crossed the line to something more. In conducting the investigation, employers should be on the look-out for subtle signs of bullying such as increased absenteeism or turnover in a particular supervisor's department because plaintiff's attorneys certainly will be. Upon the conclusion of the investigation, the alleged bully should be disciplined and counseled as appropriate based upon the investigation's results. At a minimum, the abusive supervisor and victim should be separated. If an abusive supervisor or employee is unwilling or unable to mend his/her ways, the employer is justified in firing the individual. Any misstep along the way can and will be seized upon by plaintiff's counsel.

Finally, employers should look at their handbook and ensure they have an up to date policy concerning bullying such as the one found below:

The Company is committed to providing a work environment free of bullying. In keeping with this policy, the Company maintains a strict policy prohibiting bullying. Employees found in violation of this policy will be disciplined, up to and including termination.

The Company defines bullying as repeated abusive conduct, either direct or indirect, whether verbal, physical, visual or otherwise. This policy applies to all agents and employees of the Company including supervisory and non-supervisory employees as well as non-employees doing business with the Company. Bullying may take many forms including:

1. Verbal bullying: Persistent name calling that is hurtful, insulting or humiliating; using a person as butt of jokes; rumors; abusive and offensive remarks.
2. Physical bullying: Pushing, kicking, assault or threat of physical assault, manipulating or destroying work product for the purpose of undermining an employee's performance.
3. Gesture bullying: Threatening stares and hand gesture.
4. Exclusion: Socially or physically excluding or disregarding a person from department meetings or group lunches; consistent singling out.

Any employee or other person who believes he or she has been bullied should promptly report the facts of the incident to his or her supervisor, or, in the alternative, Human Resources. Supervisor should report any incidents of bullying to Human Resources. Human Resources will investigate all such claims and take appropriate corrective action. Employees will not be subject to retaliation for registering any company of bullying in good faith.

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