The Anti-Bullying Legislative Movement: Too Quick To Quash Common Law Remedies?

According to a recent survey, thirty-seven percent of U.S. workers have been bullied on the job. One researcher found that bullying was four times more common than sexual harrassment. Modifying the common law to redress severe status-neutral harassment is a workable solution to fight the problem.

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"We have a no jerk rule here," I learned when I interviewed for my current job. Not all employees are as fortunate. Thirty-seven percent of U.S. workers have been bullied on the job, according to a September 2007 survey by the Workplace Bullying Institute. Other studies have documented higher percentages of affected employees ranging from 59%2 to 90%.3 In a study of employees at a public university, one researcher found that bullying was four times more common than sexual harassment.4 The U.S. anti-bullying movement seeks to combat the hazard with legislation modeled on European protections for status-blind harassment. U.S. workers are protected against workplace harassment, but only if the harassment is because of the employee's race, gender, age, disability, or religion. Although 13 state legislatures have introduced bills creating a cause of action for abusive workplace behavior in the past five years, the proposed legislation has failed to gain traction. Modifying the common law to redress severe status-neutral harassment is a more workable solution to the problem.

International Workplace Bullying Bans

Research on workplace bullying began in the 1980s, when Swedish psychiatrist Heinz Leymann concluded that a kind of long-term hostile behavior practitioners had observed in school children also occurred in the workplace.5 Leymann dubbed the phenomenon "mobbing." Leymann's work led to the development of anti-bullying legislation in Sweden, France, the Netherlands, Belgium, Denmark, Finland, and Quebec.

France's 2002 Social Modernization Law authorizes fines and imprisonment for "moral harassment." The law targets repeated acts having the intent or effect of degrading the employee's working conditions by impairing the employee's rights and dignity, affecting the employee's physical or mental health, or compromising the employee's future career.6 Labor Code provisions of the law punish moral harassment with one year in prison and/or 3,750 euros; while the Penal Code aspects of the law subject an offender to one year in prison and a fine of 15,000 euros.

Quebec's 2004 anti-bullying legislation provides civil remedies. In 2004, Quebec amended its Labour Code to ban "psychological harassment," termed "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." A harassed employee may file an administrative complaint. The responsible agency may order equitable remedies or award indemnity for lost wages or loss of employment, punitive and "moral damages."7 The Canadian Parliament rejected a similar law in 2004.8

In 2007, the European Union's social partnership organizations (business and labor groups that negotiate EU employment policy) signed a "framework agreement" obligating its members to implement a zero tolerance policy on status-blind workplace harassment. This agreement sets training, investigation and management guidelines for workplace bullying.

U.S. Legislative Movement

The anti-bullying lobby in this country has attempted to build on the international legislative momentum. Suffolk University Law School Professor David C. Yamada drafted model anti-bullying legislation termed the "Healthy Workplace Act."9 The act creates a cause of action for subjecting an employee to an "abusive work environment." Legislators in California, Oklahoma, Oregon, New Jersey, Connecticut, Vermont, Washington, Montana, Hawaii, Kansas, Missouri and Massachusetts have introduced some version of Yamada's proposed act in the past five years.10 The act defines "abusive work environment" as follows:

> An abusive work environment exists when the defendant, acting with malice, subjects the complainant to abusive conduct so severe that it causes tangible harm to the complainant.

Complex definitions flesh out this term. For example, "malice" is:

> the desire to see another person suffer psychological, physical, or economic harm, without legitimate cause or justification. Malice can be inferred from the presence of factors such as: outward expressions of hostility; harmful conduct inconsistent with an employer's legitimate business interests; a continuation of harmful, illegitimate conduct after the complainant requests that it cease or demonstrates outward signs of emotional

or physical distress in the face of the conduct; or attempts to exploit the complainant's known psychological or physical vulnerability.11

"Abusive conduct" is "conduct that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests." The act specifies that a fact-finder should consider "the severity, nature, and frequency" of the conduct in determining whether it is abusive. It lists examples of "abusive conduct":

- Repeated infliction of verbal abuse such as the use of derogatory remarks, insults, and 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.12

The list is not intended to be exclusive. The model legislation specifies that a single act is "normally" not enough to represent abusive conduct, but "an especially severe and egregious act" may be enough. The act states that "tangible harm" includes the material impairment of mental or physical health, as documented by "a competent physician, psychologist, psychiatrist, or psychotherapist" or "competent expert evidence at trial."13

The act creates three affirmative defenses. The first, modeled on the *Faragher/Ellerth* defense in Title VII actions, protects an employer when it exercised reasonable care to prevent and promptly remedy actionable behavior if the complainant unreasonably failed to use "preventive or corrective opportunities." The second applies to a complaint "grounded primarily" on a negative employment decision "made consistent with an employer's legitimate business interests," such as a termination based on the employee's inadequate performance. The third defense protects against actions "grounded primarily upon a defendant's reasonable investigation about potentially illegal or unethical activity."14

As of this writing, anti-bullying bills had not made it out of legislative committee in the five states in which they were introduced this year (New York, New Jersey, Connecticut, Vermont, and Washington).

Common Law Remedies

The anti-bullying movement argues vehemently that existing law inadequately protects workers from status-neutral harassment. Discrimination laws limit harassment coverage to protected classes, leading to the phenomenon that the "equal opportunity harasser" has a pass under harassment law. *See Hocevar v. Purdue Frederick Co.*, 223 F.3d 721, 737 (8th Cir. 2000) (foul language used in front of and to describe both sexes was not sex discrimination). Tort law's barriers to nondiscriminatory bullying claims are nearly insurmountable, according to the movement.

However, some courts have effectively addressed status-neutral bullying under tort theories. The Indiana Supreme Court recently affirmed a $325,000 assault award to an operating room technician who alleged that he reasonably feared imminent harm from a supervisor surgeon. *Raess v. Doescher*, 883 N.E.2d 790, 799 (Ind. 2008). The Texas Supreme Court affirmed an intentional-infliction-of-emotional-distress (IIED) award of $275,000 to three workers whose supervisor repeatedly shouted profanities at them, physically charged them, pounded his fists and threatened them with termination during a two-year period. *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605, 613-14 (Tex. 1999). The 3rd Circuit Court of Appeals reversed a summary judgment on an IIED claim by an employee whose manager used a self-termed "root canal" in which he taunted, berated and demeaned her and asked for her resignation almost every time she was in the office. *Subbe-Hirt v. Baccigalupi*, 94 F.3d 111, 115 (3d Cir. 1996). The Iowa Court of Appeals reversed an order granting JNOV on an IIED claim to supervisors who berated an employee with groundless accusations as to performance on nearly daily basis for four months and attempted to sabotage his work. *Blong v. Snyder*, 361 N.W.2d 312, 317 (Iowa Ct. App. 1984).

Minnesota courts have primarily addressed whether harassment creates tort liability in protected class contexts. However, in addressing tort claims in the protected class arena, Minnesota courts have skillfully negotiated the fine line between extreme and outrageous conduct and general workplace unpleasantness. For example, in *Wenigar v. Johnson*, 712 N.W.2d 190 (Minn. App. 2006), the Minnesota Court of Appeals affirmed the court's finding that the disabled plaintiff's employer was liable for intentional infliction of emotional distress based on evidence the employer shouted at plaintiff daily, refused to permit him to take breaks or vacation, told others he was stupid and retarded, and supplied him with housing that was uninhabitable. *Cf. Leaon v. Washington County*, 397 N.W.2d 867 (Minn. 1986) (stating in *dicta* that fact finder could decide plaintiff's coworkers acted outrageously and intentionally when they forced him to have physical contact with nude dancer at stag party held by members of plaintiff's department); *Orth v. College of St. Catherine*, 1995 WL 333875 (Minn. Ct. App. 1995) (unpublished) (reversing summary judgment on IIED claims based on supervisor's sexual comments and throwing of objects at one plaintiff).

On the other hand, Minnesota courts have consistently rejected tort claims when the employer's conduct is not egregious. In *Schibursky v. Internat'l Bus. Machines Corp.*, 820 F.Supp. 1169, 1183-84 (D. Minn. 1993), the court held that workplace surveillance of plaintiff's overtime hours and perceived verbal abuse regarding her failure to reduce her overtime did not represent extreme and outrageous conduct. *Id.* at 118-84. Similarly, the Minnesota Court of Appeals held that as a matter of law, plaintiff failed to raise a factual issue on an IIED claim based on his manager's posting of meeting notes on a company bulletin board with the words "move-ups, brown nose, shit heads" next to his name, which the employer removed at plaintiff's request. *Lund v. Chicago & Northwestern Transp. Co.*, 467 N.W.2d 366, 370 (1991). The court reasoned that the conduct was vulgar, but not extreme and outrageous. *Id.* at 370. *See also Hubbard v. United Press Internat'l, Inc.*, 330 N.W.2d 428, 439-40 (Minn. 1983) (holding employer's discipline and criticism of plaintiff neither extreme nor outrageous). The careful IIED line-drawing by Minnesota judges in the protected class harassment context reflects that our courts will deal reasonably with tort claims based on status-blind harassment.

Some jurisdictions have deferred inappropriately to the employment-at-will doctrine when faced with tort claims arising from

bullying. In one notorious case, a federal district court applying New York law granted summary judgment on an IIED action in which the plaintiff alleged her harassing boss pushed her into a file cabinet, because New York law required sexual battery as a prerequisite to tort liability for harassment. *Ponticelli v. Zurich Am. Ins. Group*, 16 F.Supp.2d 414, 440-41 (S.D.N.Y. 1998). Other courts have treated the plaintiff as particularly susceptible to emotional distress and dismissed the tort claim for lack of evidence the employer knew of the heightened vulnerability, even in cases with atrocious facts. *See Hollomon v. Keadle*, 931 S.W.2d 413, 416-17 (Ark. 1996) (employer's alleged constant cursing of employee as "white nigger," "slut," and "whore" and implicit threats regarding mob connections and handgun; summary judgment proper based on lack of notice to employer of emotional susceptibility). *See also Harris v. Jones*, 380 A.2d 611, 616-17 (Md. Ct. App. 1977) (reversing IIED judgment for plaintiff; although supervisor repeatedly verbally and physically mimicked plaintiff's stutter for five months; exacerbated anxiety did not reflect severe emotional distress).

Nonetheless, developing a legislative remedy may be neither realistic nor appropriate. Given the current economic backdrop, state legislatures are unlikely to add anti-bullying liability to employers' regulatory burden. Further, the Model Act lacks sufficient specificity to effectively deter the challenged behavior. Unlike Title VII harassment theory, which relies on a causal link to an illegal motivation, the Model Act prohibits a more general type of conduct.15 Ambiguity that limits the statute's usefulness to employers or courts may inspire nuisance litigation. One critic even contends that legislating against bullying could be ridiculed as an attempt to create a general workplace civility code, denigrating the respect accorded all employment laws.16

A better answer to the workplace bullying conundrum is to remove any inappropriate barriers in tort law. One commentator suggests that courts could use discrimination law's well-known standard of severe and pervasive conduct to evaluate whether behavior is extreme and outrageous for purposes of IIED.17 Other modifications could include removing any requirement that IIED in the workplace be sex-based in order to be actionable. Eliminating the employee's obligation to show the employer knew of his or her sensitivities and focusing on the severity of the harasser's conduct also merits consideration. The common law can deal with this employment problem more successfully and with more flexibility than a statutory scheme.

Conclusion

U.S. anti-bullying activists are eager to bring American law into step with legislative remedies adopted in Europe and elsewhere. Although tort law has demonstrated flaws in addressing status-blind harassment, case law in Minnesota and elsewhere shows that it is not the slim reed described by legislative advocates. Modifying tort law to remove unreasonable barriers to redress of egregious conduct is a more practical and efficacious solution. Of course, if all employers embraced a "no jerk" rule, this social issue could be handled in the better forum: the workplace.

Notes

1 Workplace Bullying Institute and Zogby International, *U.S. Workplace Bullying Survey—September, 2007*, at 1,4, *http://bullyinginstitute.org/research/res/WBIsurvey2007.pdf* (last viewed October 10, 2008).
2 See Loraleigh Keashly & Karen Jagatic, *By Any Other Name: American Perspectives on Workplace Bullying*, in Stale Einarsen et al, *Bullying and Emotional Abuse in the Workplace* (CRC Press, Stale Einarsen et al, eds., 2003).
3 Harvey A. Hornstein, *Brutal Bosses and their Prey*, at xiii (Riverhead Trade 1997).
4 Gary Namie & Ruth Namie, *The Bully At Work* at 6 (summarizing study by Judith Richman) (rev. ed. 2003).
5 The Mobbing Encyclopedia, at *http:www.leymann.se/* (last viewed June 5, 2008).
6 Maria Isabel S. Guerrero, *Note, The Development of Moral Harassment (Or Mobbing) Law In Sweden And France As A Step Towards EU Legislation*, 27 Boston College Int'l & Comparative Law Rev. 477 (2004), *www.bc.ed./schools/law/lawreviews/meta-elements/ bciclr/27_2/10_TXT.htm* (last viewed June 5, 2008); Code du travail, Tit. V, Ch. II (Articles L1151-1 et seq.), available at *http://www.legifrance.gouv.fr/initRechCodeArticle.do* (last viewed October 15, 2008).
7 Commission des normes du travail, An Act Respecting Labour Standards, §§ 81.13, 123.6, 123.15; *www.cnt.gouv.qc.ca/en-cas-de/harcelement-psychologique/index.html* (last viewed October 15, 2008).
8 Jacquelynne M. Jordan, *Note, Little Red Reasonable Woman and the Big Bad Bully: Expansion of Title VII and the Larger Problem of Workplace Abuse*, 13 Wm. & Mary J. Women & L. 621, 663 (Winter 2007).
9 Yamada, *supra* note 4, at 498-508.
10 Yamada, *supra* note 4, at 476-77; Workplace Bullying Institute Legislative Campaign at http://workplacebullyinglaw.org/index.html (last viewed May 8, 2008).
11 Yamada, *supra* note 4, at 518 (quoting Healthy Workplace Act, Sections 2(3), 2(3)(b)).
12 Yamada, *supra* note 4, at 518-19 (quoting Healthy Workplace Act, Section 2(3)(c)).
13 Yamada, *supra* note 4, at 519 (quoting Healthy Workplace Act, Section 2(3)(d)).
14 Yamada, *supra* note 4, at 520 (quoting Healthy Workplace Act, Section 5).
15 William R. Corbett, *The Need For A Revitalized Common Law of the Workplace*, 69 Brook. L. Rev. 91, at 154 (Fall 2003).
16 Corbett, *supra* n. 21 at 144.
17 Corbett, *supra* n. 21 at 154

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