

# Commentary

---

## Picking The Wrong Fight: Legislation That Needs Bullying

By  
**Timothy P. Van Dyck**  
and  
**Patricia M. Mullen**

*[Editor's Note: Attorney Timothy P. Van Dyck is a partner and co-chair of the Labor & Employment Practice Group of the 520-attorney national law firm of Edwards Angell Palmer & Dodge LLP. He may be reached at tvandyck@eapdlaw.com. Patricia M. Mullen is an associate in the firm's Litigation Practice Group. She may be reached at pmullen@eapdlaw.com. The views expressed in this article are those of the authors and not of Mealey Publications. Copyright 2007 by the authors. Responses are welcome.]*

Ten states<sup>1</sup> currently have legislation pending that, if enacted, would represent a seismic shift from existing laws intended to protect employees in the workplace. Such legislation would make it unlawful to “bully” at work. Current employment discrimination laws, such as those protecting older workers from age discrimination, women from sex discrimination and harassment, people of color from racial discrimination, or disabled people from disability discrimination, are all intended to protect classes of people who historically have been recognized as disadvantaged in the workplace. Not so with this pending legislation. Anyone, regardless of color, creed, nationality, or sex, is both a potential beneficiary and target of the new legislation. Equally significant is that this bullying legislation, while requiring a showing of ‘malice’, would require no proof of discriminatory animus. Presumably, the “bullying” could be motivated by something as simple as a personality clash and legal redress would still be available.

The language contained in the proposed legislation raises more questions than it answers. In Connecti-

cut, for example, the proposed legislation would create a new private cause of action for subjecting an employee to “abusive conduct” in the workplace. An employee is deemed subjected an “abusive conduct” when the behavior causes material impairment of the employee’s physical or mental health, as documented by a healthcare provider or a paid expert. “Abusive conduct” includes even just a single act of “an employer or employee in the workplace, with malice, that is unrelated to an employer’s legitimate business that a reasonable person would find hostile or offensive. . . .” Such conduct expressly includes “repeated infliction of verbal abuse;” objectively “threatening, intimidating or humiliating” verbal or physical conduct; and “sabotaging or undermining a person’s work performance.” The definition contains language cautioning that the “severity, nature, and frequency of the conduct or the severity and egregiousness of the single act” should be considered.

Given the vagueness inherent in the legislation’s language, it is worth considering some of the examples of conduct the legislation’s author hoped to address. In 2000 and again in 2005 Professor David Yamada expressed his frustration with the inability of existing laws to provide relief for “typical workplace bullying” or “garden variety bullying,” especially the type of bullying unrelated to a status protected by Title VII of the Civil Rights Act of 1964.<sup>2</sup> Professor Yamada cited to *Turnbull v. Northside Hospital, Inc.*,<sup>3</sup> a case in which an employee alleged that her supervisor engaged in abusive conduct on four occasions. Specifically, her supervisor purportedly ‘glared’ at her with ‘anger and contempt,’ cried, slammed her door and

snatched phone messages. In another example, *Denton v. Chittenden Bank*,<sup>4</sup> the employee complained that his supervisor, among other things: occasionally interrupted the employee's business meetings without knocking; turned off the employee's office telephone at times to minimize distractions; scheduled early morning meetings that interfered with the employee's car-pool arrangement; asked for revisions to memoranda the employee considered final; opined that the employee should have a college degree for his job; insisted that the employee's office door remain open; called the employee during his two-month sick leave to see how he was feeling; and opened the employee's files and desk drawers during his two-month sick leave.

### Do We Really Know It When We See It?

Justice Stewart, commenting on pornography, noted that he knew it when he saw it.<sup>5</sup> While oft-quoted, this language, like the anti-bullying legislation currently under consideration, does little to advance the discussion. The bill's language and the examples cited simply add mud to already very murky waters. If we are honest, most of us would admit to having had days where our interactions with co-workers have been challenging. It is an inescapable fact of life that on any given workday most of us deal with a wide spectrum of human behavior. At one time or another, we have all been on the giving and receiving ends of idiosyncratic, even uncomfortable, workplace conduct. The possible explanations for such behavior are limitless.

External factors make such waters murkier still. Presumably, any definition of abusive conduct would need to account for industry, geographic and cultural standards, just to name a few. A Bronx supervisor's blunt criticism of a subordinate's performance, while acceptable in New York, could well be considered abusive in the South. The military's training of its Navy Seals or the Police Academy's training of its Swat Team most likely would be considered abusive even to the most hardened of partners at a demanding law firm. What may be considered perfectly acceptable behavior on the plant floor of a manufacturing facility may be deemed offensive in the boardroom. And what about those ever-shifting fault lines created by technology? Will emailing or text messaging employees assignments on their days off be deemed abusive? Should the threshold for what constitutes bullying

be more stringent for exempt versus non-exempt employees? This proposed legislation, if enacted, would create an entire new niche market for "experts" who would opine with a reasonable degree of certainty (and for the right price) as to these factors, and a multitude of others.

The inherent difficulty in defining "abusive conduct" also creates a real conundrum for employers. Under Connecticut's bill, for example, an employer could be held vicariously liable if it fails to demonstrate that it "exercised reasonable care to prevent and promptly correct the abusive conduct, and the aggrieved employee unreasonably failed to take advantage of [the employer's] appropriate preventive or corrective opportunities." Thus, were such legislation passed, employers would be put in the impossible position of trying to predict — with no legislative guidance — the full panoply of human conduct that could potentially fall under the umbrella of "bullying."

### A Solution In Need Of A Problem

Dr. Gary Namie, co-founder of The Workplace Bullying & Trauma Institute, notes that, "the real value of having a law in place for bullied employees is to legitimize targets' complaints. . . ." He has it backwards. It is when a class of individuals has a legitimate complaint, and needs to level the playing field, that laws are made. Laws are not created to assuage hurt feelings.

It is also unreasonable to suggest that courts are the appropriate forum for handling these civility disputes. Our judicial system is already top heavy with employment litigation. There would be a huge uptick in employment lawsuits were this legislation to pass. Even one of its chief proponents concedes that, "[i]t is inevitable that the adoption of this new cause of action would lead to a significant initial surge in employment litigation." It should come as no surprise that courts have repeatedly cautioned that they are not, nor should they be considered, "super personnel departments." Rather, the appropriate forum for handling complaints of workplace bad behavior is at ground level: Human Resources. They are best equipped to investigate such matters promptly, thoroughly, and fairly, taking into account so many factors that a court neither has the time, nor the inclination, to consider. Human Resources is also familiar with the employer's corporate milieu, and can make ap-

propriate judgments in light of so many subtle, yet important, factors which would never see the light of day in court.

However well-intentioned the legislation may be, it also fails to account for the fact that redress is already available for the vast majority of bad behavior in the workplace. Where, for example, abusive conduct is motivated by race, color, religion, sex or national origin, Title VII and other anti-discrimination laws provide protection. Where the abusive conduct interferes with an employment relationship, workers can seek relief under existing common law tort theories. In most states, for example, an employee forced to resign because of intolerable working conditions can sue under common law for constructive discharge. Workers may also find relief in claims for assault, battery, defamation, or workers' compensation. There is also, of course, self-help. Employees feeling abused can complain to Human Resources; if they are not satisfied there, they can quit.

### **The Law Of Unintended Consequences**

A constant refrain from Human Resources is that managers need to be candid and communicative with their reports. More often than not, supervisors are correctly faulted for not being clearer when criticism of subordinates is warranted. Written evaluations often fail to provide specific, constructive guidance. Yet, it is precisely that kind of feedback that provides results. Supervisors need to know that they can communicate openly and candidly without fear of being sued.

Nobody would dispute that there exists a certain "rough and tumble of the world of commerce."<sup>1</sup> This "rough and tumble" is due largely to the tension created by competition. The same is true, to some extent, of the employment relationship. As an at-will society, absent contract, employers and employees are free to terminate the employment relationship at any time and for any reason, as long as the reason is not illegal. While to some this concept may seem harsh, it is a fundamental precept that helps drive our economy. Productivity is fueled, in large measure, by competitive forces within the workplace. The proposed legislation would not only inhibit productivity and employers' freedom to hire and fire at-will employees but moreover, it would chill critical workplace communication.

### **Why This, And Why Now?**

The United States has always prided itself on its rugged, even idiosyncratic, individualism. At a time when corporate America at least purports to celebrate diversity in the workplace, it is ironic that legislation is being considered which, if passed, would serve to clone workplace behavior. It is all the more curious that this legislation is being considered now when employers increasingly are stepping up their own internal governance procedures to protect employees from *any* unwelcome conduct in the workplace, not just discriminatory conduct. Employee handbooks and corporate policies now routinely contain language making it clear that any disrespectful or unwelcome conduct may be grounds for discipline.

So why this call for legislation which would make "bullying" illegal? While difficult to measure, the notion that there has been an erosion of common courtesy in our society resonates with many of us. This may be part of the reason. However, it is also, at least in part, due to a wider societal trend: the idea that once employed, always employed absent extenuating circumstances. Such a trend towards employment entitlement is perilous and must be resisted if the United States is to continue to be a leader in workplace productivity. Ultimately, employment decisions, however painful they may be, should be based on merit. To effectively reward merit, employers must have wide latitude in effectively managing their workforces. That necessarily entails direct, even uncomfortable, communication. Nobody likes being told he is being fired. From the employee's perspective, such news is certainly unwelcome, perhaps even abusive. Yet nobody would seriously challenge the employer's right to convey the message. While 'likeability' continues to gain momentum as a cherished virtue in our society, it is those who push us to excel to whom we often owe our greatest debt of gratitude. By labeling pushing as "bullying," there exists a profound risk that high expectations go by the boards and employees are denied real opportunities for advancement.

---

### **Endnotes**

1. As of May 2007, versions of "anti-bullying" legislation are pending in Connecticut, Hawaii, Kansas,

- Missouri, Montana, New Jersey, Oklahoma, Oregon, Vermont and Washington. In Massachusetts and New York, lawmakers have introduced legislation to study the issue.
2. David Yamada, *Workplace Bullying and the Law*, at 2 (Nov. 2005) available at <http://www.bullybusters.org>; David Yamada, *The Phenomenon of Workplace Bullying and the Need for Status-Blind Hostile Work Environment Protection*, 88 Geo. L. J. 475, 494 (2000).
  3. *Turnbull v. Northside Hospital, Inc.*, 220 Ga. Ct. App. 883, 884, 470 S.E.2d 464, 466 (1996).
  4. *Denton v. Chittenden Bank*, 163 Vt. 62, 64-65, 655 A.2d 703, 705-706 (1994).
  5. *Jacobellis v. State of Ohio*, 378 U.S. 184, 197, 84 S. Ct. 1679, 1683 (1964) (Stewart, J., concurring).
  6. Gary Namie, *Workplace Bullying: Escalated Incivility*, Ivey Business Journal at 6 (Nov./Dec. 2003).
  7. David Yamada, *The Phenomenon of Workplace Bullying and the Need for Status-Blind Hostile Work Environment Protection*, 88 Geo. L. J. 475, 532 (2000).
  8. *Alfano v. Costello*, 294 F.3d 365, 377 (2d Cir. 2002); *Ptasznik v. St. Joseph Hosp.*, 464 F.3d 691, 697 (7th Cir. 2006); *Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965, 978 (7th Cir. 2004); *Laosebikan v. Coca-Cola Co.*, No. 05-13174, 167 Fed. Appx. 758, 764, 2006 WL 224167 (11th Cir.); *Combs-Burge v. Rumsfeld*, No. 05-1366, 170 Fed. Appx. 856, 862, 2006 WL 694381 (4th Cir.); *Zhuang v. Datacard Corp.*, 414 F.3d 849, 855 (8th Cir. 2005).
  9. *Levings v. Forbes J. Wallace, Inc.*, 8 Mass. App. Ct. 498, 504, 396 N.E. 2d. 149, 153 (1979). ■