Legal Times
WEEK OF MAY 21, 2007 • VOL. XXX, NO. 21
ALM

Bullied by the Boss?

Companies, not state legislatures, should act to stop abusive supervisors.

BY MARK CHESKIN
AND KRISTEN FOSLID

Americans are upset about so-called "abusive bosses," and state legislatures are starting to notice. Twelve states either have considered or are now considering legislation to curb perceived workplace abuse. In one case, the law could ban such broad reaching behavior as "intimidation" or "bullying."

These state laws would be a radical extension of existing discrimination law. Courts repeatedly have said that the current civil rights laws do not create a general civility code for the workplace. These new state laws might try to do exactly that, however, and the predictable result will be a flood of litigation from workers angry at their supervisors.

Those lawsuits would not help American companies manage their employees or achieve their business goals. But then, neither do abusive bosses. Perhaps the best response by a company to this issue is to consider an anti-bullying policy. That can help achieve important business objectives, as well as reduce the litigation risk from angry employees.

No Civility Code

To understand what a significant change these state laws would be, it's helpful to understand broadly what federal law prohibits—and what it does not.

Perhaps the key federal statute governing workplace behavior is Title VII of the Civil Rights Act of 1964. This law makes it unlawful for an employer to discriminate in hiring, firing, compensation, or other terms or conditions of employment on the basis of race, color, religion, sex, or national origin.

In addition to prohibiting discrimination, Title VII has been interpreted to prohibit "harassment" that creates a "hostile work environment." To prove this unlawful harassment under Title VII or under other federal discrimination laws, a plaintiff must demonstrate that the harassment was based on his or her status as a member of a protected class and that the treatment was pervasive enough to alter the terms or conditions of employment.

Time and again, courts have made clear that discrimination laws cannot be viewed as creating a "general civility code" in the workplace.

Consider this example. Nina Kestner had a sinking feeling as she walked into work every morning, knowing that within minutes, she would encounter the intemperate behavior of her boss, Louis Viol. According to Kestner, Viol daily yelled at employees and cursed in front of them, making the work environment tense and unpleasant. Kestner also believed that Viol's behavior occasionally went beyond the generally profane, to conduct including grabbing his crotch and completely losing his temper.

So when Kestner sued her employer for sexual harassment, was it a slam-dunk case? No. In fact, the U.S. Court of Appeals for the 6th Circuit ruled against Kestner and held that Viol's boorish behavior and frequent use of obscenities was not severe enough to alter her employment conditions under Title VII. The case is *Kestner v. Stanton Group, Inc*. (2006).

Or consider this example. William Carpenter alleged that he was being discriminated against because of his race. As evidence of discrimination, Carpenter stated that his supervisor instigated problems, played childish pranks, made antagonistic comments, and placed trash in his work trailer.

According to the U.S. Court of Appeals for the 8th Circuit, however, Carpenter's evidence did not show objectively hostile conduct based on his race for purposes of Title VII. The case is *Carpenter v. Con-Way Century Express, Inc*. (2007).

Likewise, Charlotte Nugent filed a complaint against her employer in May 2005 alleging a gender-based hostile work environment. In support of her claim, Nugent submitted evidence that her supervisor spoke loudly and in an intimidating manner, including "shouting, insults and slamming furniture and objects." Nugent stated that there were numerous complaints about her supervisor's management style and use of misogynistic language.

In dismissing Nugent's claim, the U.S. District Court for the Southern District of New York noted that "the law does not

require an employer to like his employees, or to conduct himself in a mature or professional manner, or unfortunately, even to behave reasonably and justly when he is peeved." The case is *Nugent v. St. Luke's/Roosevelt Hospital Center* (2007).

As these cases demonstrate, Title VII does not codify any rules of etiquette. Rather, Title VII protects against abuse based on an individual's membership in a protected class, such as race, sex, and age. But is the tide turning for employees who feel abused more generally by their bosses?

Curbing Abuse

In a recent Employment Law Alliance Poll, 64 percent of U.S. workers said they believe an employee who has been abused by a supervisor or employer should have the right to sue that supervisor and their employer to recover damages.

Further, the poll revealed that more than half of American workers have experienced or heard about supervisors behaving abusively by doing things such as making sarcastic jokes, criticizing employees publicly, giving dirty looks, yelling, insulting employees, demeaning or embarrassing employees, or making inappropriate physical contact.

Perhaps responding to these sentiments, a number of states are considering re-stacking the cards in favor of employees. To curb perceived abuse in the workplace, numerous states are considering or have considered legislation that would empower victims of perceived abuse. These states include California, Connecticut, Hawaii, Kansas, Massachusetts, Missouri, Montana, New Jersey, New York, Oklahoma, Oregon, and Washington.

Although the proposed legislation in these states is not identical, the central theme is to curb abusive behavior in the workplace. For example, New York's anti-abuse legislation would authorize the state's labor department to study hostile workplace behavior and make recommendations for curbing any abuse.

Other states, including Oregon, are considering legislation that would make it unlawful for employers to subject an employee to "harassment, intimidation, or bullying in the workplace." The Oregon bill defines "harassment, intimidation, or bullying" as any "persistent verbal or physical act" that a reasonable person would find "threatening, intimidating, humiliating, hostile, or offensive," including "derogatory remarks, insults or epithets, physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of an employee's work performance."

Likewise, New Jersey is considering legislation that would impose a $25,000 penalty on employers that "permit an abusive work environment," that is "so severe that it causes physical or psychological harm to the employee."

The inevitable problem with any anti-abuse legislation, however, is that courts and juries will have a difficult if not impossible task of distinguishing between unlawful behavior and a supervisor having a bad day. Indeed, given that 44 percent of American workers have worked for a supervisor or employer whom they consider abusive, this legislation could open the floodgates to litigation over whether a "dirty look" or a "raised voice" undermines an employee's work performance.

Anti-abuse legislation is a bad idea, and it is unneeded in light of all the existing discrimination laws that already strike the proper balance between unlawful conduct and the unfortunate realities of some jerks in the workplace. States should not legislate against boorish behavior.

What Can Employers Do?

But if states should not act on this issue, many employers should. As shown by the recent Employment Law Alliance Poll, employees are not willing to accept abusive workplace treatment, including personal insults, rude behavior, and unwarranted criticism. No one likes a schoolyard bully, including their adult counterparts in American businesses.

Moreover, employers must recognize that these anti-bullying attitudes are reflected in the jury pool for Title VII and other anti-discrimination laws. An employer's complacency to a supervisor's abusive tactics may well be enough to tip the scales in favor of the plaintiff in a lawsuit that focuses on the facts.

Accordingly, employers should act now to deter abusive behavior, before they find themselves facing a costly lawsuit. Even if the employer would ultimately win in court under current Title VII law, it is far cheaper for the company, if at all possible, to prevent lawsuits from arising in the first place.

Whether the goal is to prevent discrimination lawsuits under current law or anticipate anti-abuse legislation, employers should be proactive. Employers should look for and take action about the signs of workplace bullying. These signs include high rates of absenteeism and sickness, employee turnover, early or ill-health retirements, low morale, poor productivity, and any complaints of abuse. Whether any state passes anti-abuse legislation, eradicating bullying serves employers' business interests, and it may help reduce the Title VII suits that might otherwise be filed.

Accordingly, employers should consider creating an anti-bullying policy. Developing an anti-bullying policy is part of a wider commitment to ensuring a safe, healthy, and productive work environment. The policy should place responsibility on all employees—directors, managers, personnel, and staff—to behave in a professional, courteous manner.

Further, the policy should state clearly that bullying is a disciplinary offense, and that appropriate confidentiality in handling employee complaints of bullying is a priority. Finally, the policy should ensure that there is a grievance procedure in place suited to dealing with bullying and abuse and that retaliation will not be tolerated against any employee who files a grievance.

Treating employees fairly at work will create a positive work environment, improve morale, reduce employee absenteeism, and increase retention rates. Getting rid of a bullying supervisor will also reduce lawsuits under Title VII motivated by perceived illegal abuse.

Stopping workplace bullies is a good idea for a variety of reasons. Employers should not wait for any ill-conceived anti-abuse legislation to implement sound business practices.

Mark Cheskin is a partner in the Miami office of Hogan & Hartson and head of its Florida labor and employment law practice. Kristen Foslid is an associate in the same group. They may be reached at mrcheskin@hhlaw.com and kmfoslid@hhlaw.com.