Bullying

It's Not Just Kid's Stuff





— by Douglas Haney —

We all remember those grade school bullies who made even the simple act of walking to class a miserable ordeal for their chosen victims. Fortunately, like teenage angst and acne, these adolescent tormentors have faded into childhood memories. Or have they? The truth is, many schoolyard bullies have grown up without growing out of their boorish behavior. They have simply traded the schoolroom for the workroom, and their classmates for their workmates. This article will explore the ongoing, but often unrecognized, problem of workplace bullying, recent legislative and judicial efforts to address this issue, and ways for municipal employers to deal with bullies in their midst.

Workplace Bullying Exists

Most employers believe that they maintain an employee-friendly work environment that is free from the harassing activities of workplace bullies. Unfortunately, the facts do not bear this out. Recently, one of the largest workplace bullying surveys conducted in the United States[1] found that a surprising 37% of America's workers —54,000,000 individuals—have been or are being bullied at work! This survey also found that:

- 72% of workplace bullies are supervisors,
- 60% of bullies are men,
- female bullies usually seek out female victims, while male bullies are "equal opportunity" harassers,
- the majority of bullying episodes last at least six months, and
- 40% of bullying victims never complain about their mistreatment.[2]

Shockingly, the study concludes that bullying is four times more likely to occur in the workplace than other forms of harassment.[3] Although other workplace surveys differ somewhat in size, scope and results,[4] it is beyond argument that workplace bullying does exist. It also exacts a high cost.

The Cost of Workplace Bullying

Perhaps as startling as the prevalence of workplace bullying is the high toll it exacts from its victims and their employers. Recent studies have shown that up to 75% of workplace bullying victims experience elevated levels of stress and anxiety, sleeplessness, loss of concentration, paranoia, depression, panic attacks, neurological changes, muscular-skeletal and digestive problems, or chronic fatigue.[5] The cost to employers is equally high, and includes increased employee absenteeism and turnover rates, more employee medical claims, a decrease in worker productivity and creativity, damage to the employer's business reputation, and lawsuits.[6]

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The Recent Push for Anti-Bullying Laws

One of the biggest and most basic problems faced by legislators intent upon making workplace bullying unlawful is creating a legal standard to use in determining what workplace conduct constitutes "bullying." A snicker, a putdown, or being ignored may all be part of normal human interactions. A supervisor who criticizes an underperforming employee may be giving that employee the motivation he needs to succeed at his job. A manager who demands perfection from her staff may be setting the high work standards that taxpayers demand from their public servants. Yet, these same actions, if repeated again and again, can also humiliate, degrade, and intimidate employees, and morph a tough management style into workplace bullying.

Nevertheless, despite the difficulties inherent in defining workplace bullying,[7] there is significant interest in enacting legislation that would outlaw such abusive conduct. While at present, no federal or state law in the United States expressly prohibits workplace bullying, it appears to be only a matter of time before such a law is enacted. California introduced the first workplace bullying legislation in 2003,[8] and since then, the pace has quickened. To date, 25 workplace bullying bills having been introduced in a dozen states—15 of them in the last two years alone.[9] Moreover, in 2006, the Hawaii Senate was successful in passing a resolution recognizing the existence of, and harm caused by, workplace bullying, and urging Hawaiian employers to develop and implement policies designed to promote a healthy and safe work environment.[10] Look for more legislative attempts to enact bullying legislation in 2009.

From an international perspective, this push for anti-bullying legislation is not groundbreaking. At a minimum, Sweden, Great Britain, Belgium, France, Ireland, and jurisdictions in Australia and Canada,[11] have already enacted anti-bullying laws that permit an employee to recover for injuries or ailments caused by workplace bullying.[12] With a new President and a more liberal Congress, the stars appear to be aligned for the enactment of the first workplace bullying laws in the United States.[13] However, until that happens, victims of workplace bullying will have to turn to the courts for relief. Ominously for employers, recent events suggest that such claims

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may now be receiving serious judicial consideration.

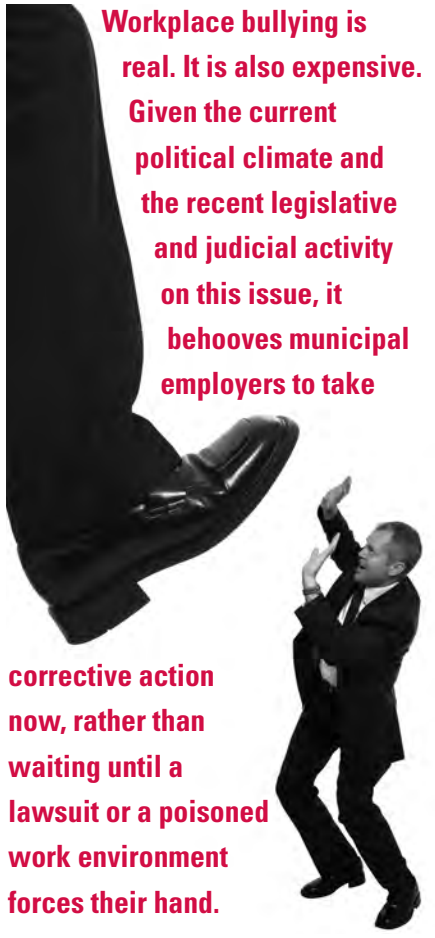
New Hope for Employee Lawsuits

While workplace bullying lawsuits in the United States remain a novelty, they have been successfully litigated elsewhere in the world. In Great Britain, for example, a Deutsche Bank employee was recently awarded approximately $1.5 million in damages as recompense for having had to endure repeated episodes of bullying that caused her to suffer emotional breakdowns and to be hospitalized as a possible suicide risk.[14] In Canada, a former Royal Canadian Mounted Police officer was awarded over CAN$740,000 in damages for having had to endure constant bullying that left her sleepless, tearful, and clinically depressed.[15]

In the absence of any federal or state bullying laws, plaintiffs' counsel in the U.S. have been left trying to fit bullying claims into the traditional common law tort theories of intentional infliction of emotional distress, tortious interference with employment, and assault.[16] However, absent evidence of severe physical or emotional harm, together with extreme and outrageous conduct by the bully, these claims have generally failed.[17]

The tide may be turning. On April 18, 2008, in the case of *Raess v. Doescher*,[18] the Indiana Supreme Court, in what may be the first successful workplace bullying lawsuit in the United States, upheld a jury verdict of $325,000 against a physician who bullied a subordinate employee. At first blush, this case appears to be no different from others in which employees have tried to address workplace bullying through traditional tort claims. Raess was a heart surgeon, and the plaintiff, Doescher, was an operating-room technician who assisted him during open-heart surgeries. When Dr. Raess learned about complaints being made to the hospital administration about his treatment of other operating-room technicians, he became angry. Screaming and swearing, he charged at Doescher with clenched fists, piercing eyes, a red face and popping veins. Backing Doescher against the wall, Dr. Raess stopped and stormed past him, saying "You're finished, you're history."[19] As a result of this incident, Doescher suffered major depression, with heightened anxiety and panic disorders. He responded by suing Dr. Raess, alleging a tortious interference with employment, the intentional infliction of emotional distress, and assault. His tortious interference claim was dismissed on summary judgment, and his remaining claims went to trial.

Workplace bullying is real. It is also expensive. Given the current political climate and the recent legislative and judicial activity on this issue, it behooves municipal employers to take corrective action now, rather than waiting until a lawsuit or a poisoned work environment forces their hand.



What makes this case unique is Doescher's trial strategy. He presented Dr. Raess as a "classic" workplace bully, and his trial witnesses included a "bullying expert," Dr. Gary Namie.[20] Not surprisingly, once Dr. Namie's name appeared on the plaintiff's expert-witness list, defense counsel filed a pre-trial motion *in limine* objecting to his testimony. They argued that Dr. Namie's testimony about workplace bullying was irrelevant to the legal issue of whether Dr. Raess committed the torts alleged, and that his conclusions about workplace bullying were the result of "junk science" that were not admissible under Indiana Rule of Evidence 702.[21] The motion was denied.

At trial, Dr. Namie testified about the phenomenon of psychological violence in the workplace, how a work environment where such violence is tolerated or encouraged can be created, and how a profile can be developed to identify the types of individuals prone to workplace bullying. Dr. Namie testified that Dr. Raess fit the profile of a workplace abuser; that the incident between Dr. Raess and Doescher was an episode of "workplace bullying;" and that Doescher had been subjected to an abusive work environment. At the close of evidence, defense counsel sought a jury instruction that "workplace bullying" was not at issue in the case and that there was no basis in law for such a claim. The trial court refused to give this instruction. The jury subsequently found for Doescher on his assault claim. On appeal, the Indiana Court of Appeals reversed and remanded, citing as error both the trial court's decision to permit Dr. Namie's testimony, and its refusal to give the tendered "workplace bullying" jury instruction.[22]

In a 4-1 decision, the Indiana Supreme Court reinstated the jury verdict. It sidestepped the issue of whether the trial court erred by permitting Dr. Namie's testimony by holding that the issue had not been properly preserved at trial.[23] Turning to the trial court's refusal to give the defense's tendered "workplace bullying" instruction, the court fired the shot heard around the employment law world—signaling, for perhaps the first time, a judicial recognition that evidence of "workplace bullying" is relevant to and can support an employee's tort claims against a workplace bully. In language that will assuredly find its way into future workplace bullying cases, the court stated that, as regards a contention that "workplace bullying" is not relevant to an employee's emotional distress and assault claims:

> [W]e disagree. In determining whether the defendant assaulted the plaintiff or committed intentional infliction of emotional distress, the behavior of the defendant was very much at issue. *The phrase "workplace bullying,"* like other general terms used to characterize a person's behavior, *is an entirely appropriate consideration in determining issues before the jury*. As evidenced by the trial court's questions to counsel during pre-trial proceedings, workplace bullying could be considered a form of intentional infliction of emotional distress.[24]

Obviously, it is too early to tell what effect the *Raess* decision will have on other workplace bullying cases. However, this decision could well become the landmark case that establishes "workplace bullying" as a new form of liability in the United States.

The Employer's Response

In light of *Raess v. Doescher,* and in the face of an increasing number of legislatures considering the enactment of workplace bullying laws, a prudent municipality would be well advised to get ahead of the curve and institute its own workplace "no bullying" policy. Obviously, this will not be quite as easy as it seems, as there is no universally-recognized definition of this type of workplace misconduct. However, difficulty has never been a good excuse for a lack of action, and there are numerous Web sites and publications available to assist an employer in this task. Such a policy should encourage the reporting of workplace bullying, provide a confidential complaint procedure (like that used for discrimination complaints), require the prompt and complete investigation of all bullying complaints, and provide for the proper punishment of employees who engage in workplace bullying or who retaliate against someone who files a bullying complaint.[25] Such a policy might read as follows:

> The City respects the personal worth and integrity of its employees. It recognizes that critical comments addressing job deficiencies, or intended to assist employees in improving their work performance or conduct, are occasionally necessary. However, the City will not tolerate workplace behavior designed to intimidate, torment, ostracize, degrade, humiliate, or otherwise "bully" an employee. Any City employee who believes that he or she has witnessed, or has been the victim of, workplace bullying is encouraged to report the matter to his or her immediate supervisor, or to the Director of Human Resources. All such reports will be promptly, confidentially, and impartially investigated, and confirmed misconduct will result in punishment, up to and including the immediate termination of the offender. Any employee who retaliates against another employee for the good-faith reporting of an incident of possible workplace bullying shall also be subject to discipline.

Most importantly, members of upper management must lead by example, by refraining from engaging in workplace bullying themselves.

Employers should also be proactive in identifying and addressing any current bullying situations that exist in their workplace. These efforts should include supervisory training on behaviors that may constitute workplace bullying, and how to appropriately mitigate the tensions caused by difficult interpersonal work relationships. In appropriate cases, behavioral counseling should be provided to those who exhibit bullying proclivities, and the employer's employee assistance program should be made available to those who feel that they are suffering from the effects of workplace bullying.

Conclusion

Workplace bullying is real. It is also expensive. Given the current political climate and the recent legislative and judicial activity on this issue, it behooves municipal employers to take corrective action now, rather than waiting until a lawsuit or a poisoned work environment forces their hand.

Notes

1. The Workplace Bullying Institute, *2007 U.S. Workplace Bullying Survey Research Report* (Sept. 2007), at www.bullyinginstitute.org/zogby2007/wbi-zogby2007.html.
2. *Id.* at 4, 7, 10, 14 and 15.
3. *Id.* at 9.
4. *See, e.g.,* Gary Namie, The Workplace Bullying Institute (WBI), *Survey of Abusive Workplaces* (2003), at www.bullyinginstitute.org; National Institute of Occupational Safety Health (NIOSH), *Most Workplace Bullying Is Worker to Worker, Early Findings From NIOSH Study Suggest* (July 28, 2004), at www.cdc.gov/niosh/updates/upd-07-28-04.html; Lora Keasley and Joel Newman, *Minnesota State University Workplace Bullying and Psychological Aggression Survey, Workplace Bullying Project Presentation Executive Summary* (May, 2008), at http://www.mnsu.edu/csw/workplacebullying; and WBI, *Employers Ignore Rampant Workplace Bullying; Co-Workers' Actions Dismal –WBI Labor Day 2008 Survey* (2008) at www.bullyinginstitute.org/research/res/wbi2008.html.
5. *See, e.g.,* WBI, *Survey of Abusive Workplaces* (2003) *supra* note 1 at 15; WBI Labor Day 2008 Survey, *supra* note 4 at 12; State of Washington Department of Labor and Industries, Report #87-2-2008 (Apr. 2008), at 2; WBI, *Bullying Compromises Target's Health and Safety,* at www.bullyinginstitute.org/ health.html; *No Bullying Allowed!* The Complete Lawyer, Vol. 4, No. 1 (Jan./Feb. 2008) at http://tinyurl.com/5owgf3; Press Release, American Psychological Association, *Bullying More Harmful than Sexual Harassment on the Job, Say Researchers* (Mar. 08, 2008) at http://www.apa.org/releases/bullying0308.html.
6. *See, e.g.,* WBI, *Survey of Abusive Workplaces* (2003), *supra* note 1 at16; Wendy H. Davis, *No Putting Up With Putdowns,* ABA Journal (Feb. 2008) at www.abajournal.com/magazine/no_putting_up_with_putdowns; Tierney Plumb, *Warning: Workplace Bullies Drive Away Other Employees,* Wash. Bus. Journal (Aug 03, 2007), at www.washington.bizjournals.com/washington/ stories/2007/08-06/smallb2.html; Liz Urbanski Farrel, *Workplace Bullying's High Cost: $180M In Lost Time, Productivity,* Orlando Bus. Journal (Mar. 18, 2002) at www.orlando.bizjournals.com/orlando/stories/2002/03/18/focus1/html.
7. The WBI Web site at http://workplacebullying.org includes a good definition of "workplace bullying." Another good online source is BullyOnline, the Web site for the U.K. National Workplace Bullying Advice Line at www.bullyoffline.org/workbully/defns.htm.
8. A.B. 1582, 2003-04 Reg. Sess. (Calif. 2003).

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9. Besides California, State legislatures that have introduced workplace bullying legislation include Connecticut (SB 60 in 2008); Hawaii (SB 2353 in 2004, SB 481 - 2005, HB 232 - 2005, SB 3269 - 2006, HB 2840 - 2006, SB 253 – 2007, HB 868 – 2007 and HB 1806 – 2007); Kansas (HB 2990 – 2006); Massachusetts (H 3809 – 2005); Missouri (HB 1187 – 2005); Montana (HB 213 – 2007); New Jersey (A 3590 – 2006); New York (A 7801A – 2007, A 04921 – 2007, S 2715 – 2007 and A 10291 – 2008); Oklahoma (HB 1467 – 2007); Oregon (HB 2410 – 2005, HB 2639 – 2005 and SB 1035 – 2007); Vermont (H 548 – 2008 and S 312 – 2008); and Washington (HB 2142 – 2008 and SB 6622 – 2008). *See* WBI, *Healthy Workplace Bill Legislative Activity – History at a Glance*, at www.workplacebullyinglaw.org/hwbgrid.html.

10. S. Res. 106, 23rd Leg. (Haw. 2006). The resolution is titled "Urging Hawaii Employers to Develop and Implement Standards of Conduct And Policies for Managers and Employees to Reduce Workplace Bullying and Promote Healthful and Safe Work Environments."

11. *See* The Victimization At Work Ordinance (Sweden – 1993); The Workcover Queensland Act (Queensland, AUS – 1996); The Protection From Harassment Act (Great Britain – 1997); The Social Modernization Law (France – 2002); The Onkelinx Law (Belgium – 2002); The Occupational Health and Safety Act (Victoria, AUS – 2004); The Psychological Harassment Act (Quebec, Canada – 2004); The Occupational Health, Safety and Welfare Amendment Act of 2005 (South Australia, AUS – 2005); The Occupational Health And Safety Amendment Act (Saskatchewan, Canada – 2007); and the Code of Practice For Employers And Employees on The Prevention And Resolution of Bullying At Work (Rep. of Ireland – 2007). *See also*, Kate McCormack, *Bullying and the Anti-Discrimination Act*, Queensland Anti-Discrimination Commission (2002), at www.adcq.qld.gov.au/newsletter/issue09/Bullying.html; HR & Diversity Management, Ltd., *Bullying And Harassment*, at www.hrmgt.co.uk/bullying.html; Human Resources and Social Development Canada, *Rights, Respect and Dignity: Interface of Labour Standards and Human Rights Legislation*, at www.hrsdc.gc.ca/en/labour/employment_standards/fls/research/research14/page06.shtml; New Brunswick Advisory Council on The Status of Women, *Workplace Bullying* (March, 2007), at www.acswcccf.nb.ca/english/documents/Workplace%20bullying%20POSITION%20PAPER%20March% 202007.pdf; CBS News, *Saskatchewan's Workplace Bullying Ban Now In Effect* (Oct. 01, 2007), at www.cvc.ca/canada/ saskatchewan/stry/2007/10/01/saskatchewen -bullying.html; Jurgen Oste, *Social Partners Evaluate Legislation On Workplace Harassment* (Jan. 23, 2004), at www.eurofound.europa.eu/eiro/ 2003/12/feature/ BE0312304F.htm; Tony Dobbins, *New Code of Practice to Prevent Workplace Bullying* (May 21, 2005), at www.eurofound.europa.eu/euro/2007/04/IE0704029I.htm; and *Workplace Bullying*, at www.en.wikipedia.org/ wiki/workplace-bullying#Australia.

12. An extensive listing of laws worldwide that address workplace bullying, prepared by the Organization International del Trabajo, can be found at www.ilo.org/public/spanish/dialogue/sector/themes/violence/legal.htm.

13. *See, e.g.*, Catherine Saillant, *A Bulwark Against Bullies*, THE LOS ANGELES TIMES, Dec. 05, 2005, at www.articles.latimes.com/2005/dec/05/local /me-bully5.

14. Jasper Gerard, *Bullying Court Case Led Victim To Lost Family*, THE LONDON TIMES, Aug. 06, 2006, at www.timesonline.co.uk/tol/news /uk/article601386.ece.

15. Gerry Bellett, *Ex-RCMP Officer Harassed On Job Gets $1 Million*, THE VANCOUVER SUN, Jan. 24, 2006 at www.bullyinginstitute.org/education/bbstudies/rcmp.html. Another Canadian case is *Sulz v. Canada (Attorney General)* (2006), 263 D.L.R. (4th) 58 (B.C. S.C.) (damages award of $950,000.00 to another former RCMP officer who was severely harassed and belittled at work by a superior; expert evidence was that plaintiff was "competitively unemployable" as a result).

16. *See, e.g.*, Denton v. Chittenden Bank, 655 A.2d 703 (Vt. 1994).

17. *Id.* at 706-07 (employee's claim that supervisor embarked on insulting and vindictive course of conduct toward him amounting to intentional infliction of emotional distress failed, as supervisor's conduct did not reach level of outrage necessary for finding of intentional infliction of emotional distress. Law not intended to cover "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities"); Frye v. St. Thomas Health Svcs., 227 S.W.3d 595 (Tenn. Ct. App. 2007) (employee failed to establish that the hostile work environment she encountered was age discriminatory, as nothing in the record established that her immediate supervisor treated age-protected employees any differently than non-protected employees, rather, the testimony clearly showed that employee's supervisor was an "equal opportunity oppressor," using her intense, dominant, abrupt, rude, and hard-nosed management style on all hospital employees). Of course, if an actual battery occurs during a bullying episode, or evidence exists showing that bullying was based upon an employee's protected status, a victim's chances of success greatly increase. *See, e.g.*, E.E.O.C. v. National Educ. Ass'n, Alaska, 422 F.3d 840 (9th Cir. 2005) (a pattern of abuse in the workplace directed at women, whether or not it was motivated by lust or by a desire to drive women out of the organization, could violate Title VII of the Civil Rights Act of 1964); Araujo v. Welch, 742 F.2d 802 (3d Cir. 1984) (defendant army officer who supervised civilian plaintiff was entitled to immunity as government official on claims of verbal abuse and intentional infliction of emotional distress, but not on claim of physical abuse, as he was acting beyond the "outer perimeter" of his duty).

18. 883 N.E. 2d 790 (Ind. 2008).

19. *Id.* at 794. Doescher thought Raess was going to hit him, "[t]hat he was going to smack the s* *t out of me or do something." *Id.*

20. Gary Namie, Ph.D., a social psychologist, is regarded as one of the foremost authorities on workplace bullying. He is the co-founder and director of The Workplace Bullying Institute, a not-for-profit organization that is at the forefront of the international fight against workplace bullying.

21. *Id.* at 796. Indiana Rule of Evidence 702 provides, in part, that: "[e]xpert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable." Federal Rule of Evidence 702 also permits only expert testimony that is based upon reliable scientific principles.

22. 858 N.E.2d 119 (Ind. Ct. App. 2006).

23. *Raess*, 883 N.E. 2d at 796-97 ("Only trial objections, not motions in limine, are effective to preserve claims of error for appellate review. Failure to object at trial to the admission of the evidence results in waiver of the error....").

24. *Id.* at 799 (emphasis added).

25. Surprisingly, one study found that over 60% of employers faced with evidence of workplace bullying either *did nothing, or made matters worse* for the bullied employee! WBI, *2007 U.S. Workplace Bullying Survey Research Report*, *supra* note 1 at 10. This response simply won't fly in today's legal environment. **M**

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