Revue de droit comparé du travail et de la sécurité sociale

4 | 2018
English Electronic Edition

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Electronic version

URL: <https://journals.openedition.org/rdctss/1814>

DOI: 10.4000/rdctss.1814

ISSN: 2262-9815

Publisher

Centre de droit comparé du travail et de la sécurité sociale

Printed version

Date of publication: 1 December 2018

Number of pages: 182-189

ISSN: 2117-4350

Electronic reference

L. Camille Hébert, "The Legal Status of Bullying in the United States", *Revue de droit comparé du travail et de la sécurité sociale* [Online], 4 | 2018, Online since 01 November 2021, connection on 15 November 2021. URL: <http://journals.openedition.org/rdctss/1814>; DOI: <https://doi.org/10.4000/rdctss.1814>

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THE LEGAL STATUS OF BULLYING IN THE UNITED STATES

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In many other countries around the world, there are specific prohibitions against psychological harassment or bullying in the workplace, with some of those prohibitions specifically requiring employers to take steps to seek to prevent that conduct from occurring.¹ The law in the United States, however, is both less specific and less certain with respect to the existence of a duty imposed on employers concerning this type of conduct. The reason for this difference is that the law in the United States does not specifically prohibit bullying in the context of the workplace. Instead, employers are under a duty to act with respect to bullying and can face liability for a failure to act only if and to the extent that the bullying violates some other legal prohibition. While there have been efforts to enact legislation to specifically prohibit workplace bullying, to date those efforts have been largely unsuccessful.²

I- FEDERAL LAW RELEVANT TO WORKPLACE BULLYING

The most likely source of protection for employees from workplace bullying is found in the federal prohibition of workplace discrimination based on enumerated protected traits. Title VII of the Civil Rights Act of 1964³ prohibits discrimination on the basis of race, sex, religion, and national origin, and the United States Supreme Court has concluded that harassment on one of those grounds can constitute discrimination with respect to terms and

1 In France, for example, moral harassment is prohibited in both the Penal Code and the Labor Code and employers have a specific duty to prevention. Code du Travail art. L1152-1; Code Penal art. 222-33-2.

2 Professor David Yamada has been a tireless advocate for the legal recognition of workplace bullying and has drafted model legislation, the Healthy Workplace Bill, that has served as the basis for proposed legislation introduced into a number of state legislatures. See D. C. Yamada, *Crafting a Legislative Response to Workplace Bullying*, 8 Employee Rights and Employment Policy Journal 475 (2000).

3 42 U.S.C. §§ 2000e to 2000e-17.

conditions of employment, if certain requirements are met.⁴ The Age Discrimination in Employment Act of 1967⁵ and Title I of the Americans With Disabilities Act of 1990⁶ contain similar prohibitions of discrimination, and therefore harassment, on the basis of age of age 40 and on the basis of disability, respectively. Harassment or bullying that is not based on one of the protected traits specifically protected by the anti-discrimination statute is not generally unlawful, at least as a matter of federal law.⁷ That is, employees who are bullied because of their race, sex, or other protected characteristic may have a legal basis for challenging the bullying to which they are subjected, while employees bullied for some other reason are without legal protection from the anti-discrimination laws.

Even employees who can demonstrate that they have been subject to bullying because of characteristics protected by the anti-discrimination laws still must meet other requirements in order for that bullying to violate federal law. In particular, employees must be able to demonstrate that they subjectively perceived the harassment or bullying to be offensive or abusive, as well as that the conduct was objectively severe or pervasive such that a reasonable person in their circumstances would find the conduct hostile or abusive, so that the terms and conditions of their employment have been discriminatory altered.⁸ Accordingly, even bullying based on characteristics protected by the anti-discrimination laws will be unlawful only if the conduct is quite serious or continues over a period of time. A number of courts have concluded that employees have alleged or proven the existence of bullying that is sufficiently severe or pervasive to qualify as a hostile work environment and therefore be unlawful under the anti-discrimination laws.⁹

4 Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) (“Without question, when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex.”).

5 29 U.S.C. §§ 631 to 633a.

6 42 U.S.C. §§ 12101 to 12103, 12111 to 12117.

7 See Johnson v. City University of New York, 48 F. Supp. 3d 572, 574 (S.D.N.Y. 2014) (“Bullying and harassment have no place in the workplace, but unless they are motivated by the victim’s membership in a protected class, they do not provide the basis for an action under Title VII.”); Watkins v. First Student, Inc., 2018 WL 1135480, * 15 (S.D.N.Y. 2018) (“When [courts] say that Title VII, and corresponding state and local laws, are not a civility code, [they] are saying even if mean-spiritedness and bullying renders a workplace environment abusive, there is no violation of the law unless that mean-spiritedness and bullying is rooted in . . . discrimination [based on a protected characteristic]”).

8 See Harris v. Forklift Systems, Inc., 510 U.S. 17, 21-23 (1993). See also Davis-Garett v. Urban Outfitters, Inc., 2017 Fair. Empl. Prac. Cases (BNA) 342,705, * 4 (S.D.N.Y. 2017) (“Mere bullying is not enough to make out a claim for a hostile working environment.”).

9 See, e.g., Equal Employment Opportunity Commission v. National Education Association, Alaska, 422 F.3d 840 (9th Cir. 2005) (workplace bullying of three women, including by shouting at them in a profane manner and by physically threatening actions, could state a claim under Title VII); Nesbitt v. University of Maryland Medical Center, 2013 WL 6490275 (D. Md. 2013) (bullying and demeaning behavior over two years on weekly basis, including by yelling at female plaintiff in front of other employees and treating her in condescending manner, were sufficient to state claim of harassment on the basis of gender and age).

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Another potential source of federal protection against workplace bullying is the Occupational Safety and Health Act, whose general duties clause provides that “[e]ach employer ... shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”¹⁰ Although workplace bullying has been recognized as a form of workplace violence that can have both psychological and physical effects,¹¹ the Occupational Safety and Health Administration does not appear to view workplace bullying as a problem generally within its purview. Instead, the agency takes the position that “[b]ullying, intimidation, and harassment generally do not meet [the] criteria” of causing or being likely to cause physical harm.¹²

The Occupational Safety and Health Administration has not imposed a binding duty on employers to prevent workplace bullying.¹³ In its Enforcement Procedures and Scheduling for Occupational Exposure to Workplace Violence, the agency indicates that “OSHA should generally **not** initiate an inspection in cases of co-worker or personal threats of violence,” but should instead consider the appropriateness of an inspection on a case-by-case basis, based on the foreseeability and severity of the instances, as well as whether the employer has taken steps to address the hazard. Those procedures indicate that if area directors become aware of “instances that could be classified as intimidation or bullying, they should consider referring the complainant to the appropriate government entity,” such as the Equal Employment Opportunity Commission or the National Labor Relations Board.¹⁴ These procedures suggest that the Occupational Safety and Health Administration generally views workplace bullying not as a problem under the Occupational Safety and Health Act, but only a possible problem under other legal regimes. On the other hand, the guidelines do

10 29 U.S.C. § 654(a)(1).

11 The Occupational Safety and Health Administration defines “workplace violence” as “any act or threat of physical violence, harassment, intimidation, or other threatening disruptive behavior that occurs at the work site, including “threats and verbal abuse.” United States Department of Labor, Occupational Safety and Health Administration, Safety and Health Topics, found at <https://www.osha.gov/SLTC/workplaceviolence> (last visited March 15, 2018). See also *Garity v. APWU-AFL-CIO*, 2017 L.R.R.M. (BNA) 286,035, * 3 (D. Nev. 2017) (excluding testimony of expert on workplace bullying, who would have testified that workplace bullying can cause mental and physical distress, because the testimony would not be helpful to the jury “because it does not concern matters beyond the common knowledge of the average layperson”).

12 United States Department of Labor, Occupational Safety and Health Administration, Directive No. CPL 02-01-058, Enforcement Procedures and Scheduling for Occupational Exposure to Workplace Violence 10 (effective Jan. 1, 2017) .

13 See Memorandum for Regional Administrators from Richard E. Fairfax, Director, Directorate of Enforcement Programs (June 4, 2004) (referencing guidance provided to employers on workplace violence and noting that failure to implement guidance is “not a violation, or evidence of a violation of the general duty clause”).

14 United States Department of Labor, Occupational Safety and Health Administration, Directive No. CPL 02-01-058, Enforcement Procedures and Scheduling for Occupational Exposure to Workplace Violence 7 (effective Jan. 1, 2017) (emphasis in original).

seem to recognize that incidents of workplace bullying that are sufficiently severe and foreseeable on the part of the employer might constitute a violation of the general duty clause, particularly if the employer has not taken steps to address that conduct.

II - STATE LAW RELEVANT TO WORKPLACE BULLYING

Although federal law does not comprehensively deal with workplace bullying, there are a few state statutes that specifically address bullying in the workplace. In particular, California, Tennessee, and Utah have enacted legislation to address workplace bullying,¹⁵ although none of those statutes expressly prohibits bullying in the workplace or provides a private cause of action for employees who have been the victims of workplace bullying.

California's statute provides that employers in the state who are already required to provide sexual harassment training to supervisory employees must include as a component of that training the prevention of abusive conduct. "Abusive conduct" is defined by the statute to mean "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."¹⁶ The statute provides that a claim that training did not reach particular individuals shall not "in and of itself" result in liability on the part of the employer to any present or former employee or job applicant for a claim for sexual harassment, but neither does the employer's compliance with the statute insulate the employer from liability for a claim of sexual harassment.¹⁷ Accordingly, while the California statute may cause covered employers and their supervisory employees to be more aware of the need to prevent workplace bullying, it does not impose or otherwise affect employer liability for that bullying.

The Utah statute dealing with workplace bullying also focuses on training rather than prohibition of that conduct. That statute amended the Utah State Personnel Management Act to require the state Department of Human Resource Management to provide training to supervisors and employees of executive branch agencies on how to prevent abusive workplace conduct; the statute also authorizes the department to develop policies against abusive workplace conduct. "Abusive conduct" is defined in the statute to include "verbal, nonverbal, or physical conduct of an employee to

15 Another jurisdiction, Puerto Rico, in 2014 adopted legislation declaring October 9 of each year as "Unity Day," in order to raise awareness of bullying in "schools, the workplace, and communities." 2014 P.R. Laws No. 7 (approved June 25, 2014); I L.P.R.A. § 5271.

16 The California provision relating to "abusive conduct" was enacted in 2014. 2014 Cal. Legis. Serv. ch. 306 (filed Sept. 9, 2014). Cal. Gov't Code § 12950.1(b), (h)(2). The statute further defines abusive conduct in the following way: "Abusive conduct may include 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, or the gratuitous sabotage or undermining of a person's work performance. A single act shall not constitute abusive conduct, unless especially severe and egregious."

17 Cal. Gov't Code § 12950.1(e).

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another employee that, based on its severity, nature, and frequency of occurrence, a reasonable person would determine ... is intended to cause intimidation, humiliation, or unwarranted distress [or] ... results in substantial physical or psychological harm as a result of intimidation, humiliation, or unwarranted distress.”¹⁸ The Utah statute provides that it does not create a private right of action, expand or diminish rights previously available, or expand or diminish grounds from discipline, but that it also does not “exempt or relieve a person from a liability, duty, or penalty provided by another federal or state law.”¹⁹ Like the California statute, the Utah statute does not impose on an employer liability for workplace bullying or otherwise affect an employer’s liability for that conduct.

Tennessee’s statute that addresses workplace bullying, known as the “Healthy Workplace Act,” provides that the Tennessee Advisory Commission on Intergovernmental Relations shall create a model policy for governmental employers to prevent abusive conduct in the workplace; the statute provides that an employer who adopts the model policy shall be “immune from suit for any employee’s abusive conduct that results in negligent or intentional infliction of mental anguish, although the existence of such a policy does not limit the personal liability of an employee for such abusive conduct.”²⁰ “Abusive conduct” is defined in the statute to mean “acts or omissions that would cause a reasonable person, based on the severity, nature, and frequency of the conduct, to believe that an employee was subject to an abusive work environment, such as: (A) Repeated verbal abuse in the workplace, including derogatory remarks, insults, and epithets; (B) Verbal, nonverbal, or physical conduct of a threatening, intimidating, or humiliating nature in the workplace; or (C) The sabotage or undermining of an employee’s work performance in the workplace.”²¹

Although the staff of the Commission drafted a model policy, it does not appear that the Commission has adopted such a policy. The Tennessee Department of Human Resources, however, has adopted a policy on Abusive Conduct in the Workplace. That policy provides that “[i]t is the policy of the State of Tennessee to provide a work environment free from abusive conduct” and that the state “will not tolerate any behavior in the workplace that is abusive or disrupts the work environment.” However, the policy also notes that the policy “is not intended to state contractual terms between the State and its employees, applicants for employment, or parties who do business

18 This statute was enacted in 2015. 2015 Utah Laws ch. 211 (effective July 1, 2015). Utah Code Ann. § 67-19-44. The statute also provides that “[a] single act does not constitute abusive conduct, unless it is especially severe and egregious.” The Utah Administrative Code provides that “[i]t is the policy of the State of Utah to provide a work environment free from abusive conduct” and contains information on the complaint and investigative procedures for abusive workplace conduct. U.A.C. R477-16.

19 Utah Code Ann. § 67-19-44(7).

20 The Tennessee statute was adopted in 2014. 2014 Tenn. Laws ch. 997 (approved May 22, 2014). Tenn. Stat. § 50-1-501 to 50-1-505.

21 Tenn. Stat. § 50-1-502(1).

with the state” and that “this statement constitutes ONLY the policy of the State of Tennessee” and that a violation of the policy “does not mean that conduct violates state and/or federal laws.”²² Accordingly, the Tennessee statute imposes no legal duty on employers with respect to bullying and in fact may insulate government employers from liability for workplace bullying in certain circumstances.

Some employees have asked courts to recognize a common law claim of workplace bullying in the absence of a statute, but those claims have been unsuccessful, with courts unwilling to recognize such a claim in the absence of legislative action. Accordingly, courts have generally refused to recognize either independent tort claims based on workplace bullying or a common law claim of wrongful discharge based on a public policy against workplace bullying.²³

There are other causes of action under the common law of several states that have been asserted in order to hold employers liable for workplace bullying. Although some employees have successfully asserted claims of assault and battery for threatened or actual physical violence,²⁴ the claim most likely to be asserted for the psychological harms of workplace bullying is a claim of intentional infliction of emotional distress.²⁵ In order to state a claim for intentional infliction of emotional distress, an employee must establish the existence of extreme and outrageous conduct calculated to cause severe emotional distress.

The level of extreme and outrageous conduct necessary to establish a claim of intentional infliction of emotional distress has been described as that which is “so atrocious that it passes the boundaries of decency and is utterly intolerable to the civilized community” and would lead “an average member of the community to exclaim ‘Outrageous!’”²⁶ Accordingly, only the most extreme forms of bullying are likely to be actionable under this tort claim.

22 Tennessee Department of Human Resources Policy No. 17-001 (effective date March 15, 2017) (emphasis in original).

23 See, e.g., *Connearney v. Main Line Hospitals, Inc.*, 2015 WL 9302912, * 6 (E.D. Pa. 2015) (court refused to “create a common law cause of action in Pennsylvania for bullying”); *Ramseur v. Perez*, 962 F. Supp. 2d 21, 30 (D.D.C. 2013) (dismissing plaintiff’s tort claim for “workplace bullying” on grounds that there is no “independently cognizable common law claim for ‘workplace bullying’”); *Jaber v. FirstMerit Corp.*, 2017 -Ohio- 277, 81 N.E.3d 879, 891-892 (Ohio App. 2017) (court refused to “expand the current state of the law to recognize a claim for violation of public policy on the basis of bullying”).

24 See *Raess v. Doescher*, 883 N.E.2d 790, 793-794 (Ind. 2008) (hospital employee stated claim of civil assault against doctor based on doctor’s action of aggressively and rapidly advancing on the plaintiff with clenched fists, piercing eyes, beet-red face, popping veins, while screaming and swearing at him, then stopping and storming past the employee while declaring “you’ve finished, you’re history”).

25 See *Raess v. Doescher*, 883 N.E.2d 790, 799 (Ind. 2008) (in discussing proposed instruction on “workplace bullying,” court noted that “workplace bullying could ‘be considered a form of intentional infliction of emotional distress’”).

26 *Kearney v. Orthopaedic and Fracture Clinic, P.A.*, 2015 WL 5194832, * 6 (Minn. App. 2015). See also Restatement (Second) of Torts § 46 cmt. d (1965); Restatement (Third) of Torts § 46 cmt.d (2012).

Courts considering claims of intentional infliction of emotional distress have disagreed on whether such claims are generally cognizable in the context of the workplace. Some courts have suggested that workplace bullying is fairly common in the workplace and therefore might not be the “extreme” sort of conduct necessary to prove intentional infliction of emotional distress; some courts have even suggested that “individuals in the workplace reasonably should expect to experience some level of emotional distress, even significant emotional distress, as a result of conduct in the workplace.”²⁷

On the other hand, some courts have suggested that the existence of an imbalance of power in the employment relationship might make it more likely that a claim of intentional infliction of emotional distress could be established based on “a pattern of deliberate, repeated harassment over a period of time.”²⁸

Courts have reached inconsistent conclusions on whether workplace bullying can be severe enough to state a claim for intentional infliction of emotional distress. For example, some courts have held that “bullying and ostracism” by co-workers, consisting of “isolating behavior, insensitive comments, and hostile and unpleasant conversations” are not sufficient to meet the standard of extreme and outrageous conduct.²⁹ But at least some courts have allowed employees’ claim of intentional infliction of emotional distress based on workplace bullying to proceed to be decided by a jury, thereby allowing a jury to conclude that the bullying was sufficiently extreme and outrageous to be unlawful under this tort claim.³⁰

27 *Espinoza v. The Computer Co.*, 2015 WL 1014865 (Conn. Super. Ct. 2015). *See also* *Woodward v. Elizabethtown Community and Technical College*, 2015 WL 4464100, * 6 (W.D. Ky. 2015) (“The workplace is too often a source of insults and indignities, but the law does not redress all rude and disheartening actions taken by employers.”).

28 *Northern v. State of Louisiana*, 2015 WL 6839998, * 6 (La. App. 2015).

29 *Kearney v. Orthopaedic and Fracture Clinic, P.A.*, 2015 WL 5194832, * 7 (Minn. App. 2015). *See also* *Britton v. Athenahealth, Inc.*, 31 Mass. L. Rptr. 182, 2013 WL 2181654, *5 (Mass. Super. Ct. 2013) (bullying, including sending hostile emails and undermining employee’s work performance, did not meet the standard of extreme and outrageous behavior).

30 *See, e.g., Willis v. Career Education Corp.*, 31 A.D. Cases (BNA) 1293, 2015 WL 3859191, * 13 (N.D. Ill. 2015) (workplace bullying might cross threshold of extreme and outrageous conduct); *Espinoza v. The Computer Co.*, 2015 WL 1014865, *1-2 (Conn. Super. Ct. 2015) (court held that reasonable minds could differ on whether the bullying to which the employee was subjected by his supervisor was extreme and outrageous).

Conclusion

The law in the United States has not kept pace with that of other countries in recognizing claims based on workplace bullying. This failure appears to be attributable to two different concerns expressed by legislatures and courts in declining to enact new prohibitions on bullying or in extending existing law to recognize those claims. The first concern is that recognition of a claim of workplace bullying would impose "civility codes" on workplaces and thereby constrain the actions of employers and supervisors in dealing with employees.³¹ The second concern is that holding employers liable for psychological

harms would impose too much of a burden on employers to pay the costs of what may be viewed as unverifiable harm. Perhaps as the recognition of the personal and organizational costs of workplace bullying grows, employers, courts, and legislatures may feel the need to address this pervasive workplace problem.

31 See *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (1998) (addressing concern about turning Title VII into a "general civility code").