

WHAT SHOULD BE DONE ABOUT WORKPLACE BULLYING?

by Philip J. Moss

According to the Workplace Bullying Institute,

up to a third of workers may be the victims of workplace bullying. About twenty percent of workplace bullying crosses the line into harassment. The New York Times found that about sixty percent of workplace bullies are men, and they tend to bully male and female employees equally. Female bullies, however, are more likely to bully other females.

<http://www.bullyingstatistics.org/content/workplace-bullying.html>

I. Bullying vs. Unlawful Harassment.

Bullying and unlawful harassment overlap to a great degree. Both are defined by speech and conduct that is hostile, offensive, embarrassing and/or intimidating. Both may be inflicted by someone in a superior position over the victim, or by a co-worker or co-workers. The essential difference between bullying (which is not unlawful) and unlawful harassment lies in the motivation: conduct directed at an employee *because of* his or her race, sex, age, disability or membership in some other protected classification may constitute unlawful harassment, while the same conduct directed at the employee merely out of spite, malice or any reason *other* than membership in a protected class is lawful. Of course, given the legal analysis that is used in deciding motions for summary judgment,ⁱ there are cases that go to the jury in which even the most reasonable jurors could conclude that the same conduct was either lawful bullying or unlawful harassment. A second difference is degree. In order for unlawful harassment to be actionable, it must be severe or pervasive; since bullying is (by the above definition) not actionable in this country, no such yardstick is required.ⁱⁱ For example, A and B both work for the same employer. Every day, A calls B “stupid,” “clumsy,” “worse than useless,” and repeats these remarks to others. A also unfairly accuses B of making him (A) look bad, of making mistakes, of causing accidents, of shoddy work, and repeats these accusations to co-workers and/or supervisors.ⁱⁱⁱ

Assume that A and B are both the same race and gender, and assume further that A does not just single B out for this type of abuse, but inflicts it on others in equal measure who are of different race and gender. A’s conduct meets the definition of bullying, and it may be due to a mean streak, a deep seated feeling of inferiority or insecurity on his part, or a personality disorder, but nothing in this set of facts suggests that it is motivated by B’s race or sex.

However, the harm inflicted by A’s conduct on B and their employer is on a par with the harm inflicted if the facts suggested that A’s conduct *was* directed at B because of B’s race or sex.

The Canadian Centre for Occupational Health and Safety states on its website:

People who are the targets of bullying may experience a range of effects. These reactions include:

- shock
- anger
- feelings of frustration and/or helplessness

- increased sense of vulnerability
- loss of confidence
- physical symptoms such as
 - inability to sleep
 - loss of appetite
- psychosomatic symptoms such as
 - stomach pains
 - headaches
- panic or anxiety, especially about going to work
- family tension and stress
- inability to concentrate, and
- low morale and productivity.

and

Bullying affects the overall "health" of an organization. An "unhealthy" workplace can have many effects. In general these include:

- increased absenteeism
- increased turnover
- increased stress
- increased costs for employee assistance programs (EAPs), recruitment, etc.
- increased risk for accidents / incidents
- decreased productivity and motivation
- decreased morale
- reduced corporate image and customer confidence, and
- poorer customer service.^{iv}

To this list should be added, “increased likelihood of litigation,” as victims of workplace bullying may allege that they are victims of unlawful harassment, and seek relief under federal and state civil rights statutes.

Interestingly, the U.S. Occupational Safety and Health Administration (OSHA) has adopted a policy for its own employees which prohibits “bullying,” but has not mandated such for all employers under the General Duty Clause of the OSH Act.^v

III. What Can Or Should Be Done?

The April 2011 article published by the SHARP Program in Washington State recommends that all employers implement a workplace violence policy that prohibits bullying, as part of a broader safety and health program, and the procedures they recommend are similar or identical to those that most employers should follow when implementing a policy prohibiting unlawful harassment.^{vi} Of especial importance is the need to train supervisors and managers (a) to spot instances of bullying conduct and (b) to take prompt action to put a stop to it.

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ⁱ See P.Moss, The Cost Of Employment Discrimination Claims, Maine Bar Journal, Vol. 28, No. 1, Winter 2013, at pp. 26-27.

ⁱⁱ Workplace bullying is unlawful in some countries, e.g., Australia and New Zealand. However, the cost of litigation and the compensation awarded for claims tend to be considerably less in those jurisdictions than for claims of unlawful harassment in this country. See <http://www.dol.govt.nz/er/services/law/case/themes/2009-08-workplace-bullying.asp> and http://www.comcare.gov.au/data/assets/pdf_file/0016/70414/Bullying_at_work_-_A_guide_for_employees_OHS78.pdf.

ⁱⁱⁱ The Canadian Centre for Occupational Health and Safety lists the following examples of workplace bullying on its website:

- excluding or isolating someone socially
- spreading malicious rumours, gossip, or innuendo that is not true
- intimidating a person
- undermining or deliberately impeding a person's work
- physically abusing or threatening abuse
- removing areas of responsibilities without cause
- constantly changing work guidelines
- establishing impossible deadlines that will set up the individual to fail
- withholding necessary information or purposefully giving the wrong information
- making jokes that are 'obviously offensive' by spoken word or e-mail
- intruding on a person's privacy by pestering, spying or stalking
- assigning unreasonable duties or workload which are unfavourable to one person (in a way that creates unnecessary pressure)
- underwork - creating a feeling of uselessness
- yelling or using profanity
- criticizing a person persistently or constantly
- belittling a person's opinions
- unwarranted (or undeserved) punishment
- blocking applications for training, leave or promotion
- tampering with a person's personal belongings or work equipment.

<http://www.ccohs.ca/oshanswers/psychosocial/bullying.html>

^{iv} <http://www.ccohs.ca/oshanswers/psychosocial/bullying.html> Similar warnings appear in a report issued in April 2011 by the Safety & Health Assessment for Research and Prevention (SHARP) Program of the Washington State Department of Labor and Industries. <http://www.lni.wa.gov/Safety/Research/Files/Bullying.pdf>

^v OSHA Field Safety & Health Manual, Ch. 10. [http://op.bna.com/env.nsf/id/sbra-8hdrfp/\\$File/OSHA%20manual.pdf](http://op.bna.com/env.nsf/id/sbra-8hdrfp/$File/OSHA%20manual.pdf)

^{vi} <http://www.lni.wa.gov/Safety/Research/Files/Bullying.pdf>