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Workplace Bullying: Beyond Harassment and Discrimination, Prevention, Defense of Claims

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Today's faculty features:

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Workplace Bullying:
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Today's Speakers



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All About Workplace Bullying



What is Workplace Bullying?



Examples & Types of Bullying



The Impact of Bullying: Employee



The Impact of Bullying: Employer



What Can Your Organization Do About Bullying



What is Workplace Bullying?

- Repeated, unreasonable actions of individuals (or a group) directed towards an employee (or a group of employees)
- Intended to intimidate
- Creates a risk to the health and safety of the employee(s) and a feeling of defenselessness.
- Undermines an individual's right to dignity in the workplace.
- Typically involves an on-going pattern
- Often involves an abuse or misuse of power.

Examples of Bullying



CONSTANT, RUDE
OR INVALID
CRITICISM.



BEING HELD TO A
DIFFERENT
STANDARD.



FALSE ACCUSATIONS
OR BLAME.



BEING
SWORN OR
YELLED AT.



BEING
HUMILIATED OR
BELITTLED.



BEING THE TARGET
OF PRACTICAL
JOKES OR GOSSIP.



EXCLUDED FROM
PROJECTS OR
MEETINGS.



EXCESSIVE
MONITORING.

A Culture of Bullying

- Bullying is entrenched and accepted.
- Unreasonable expectations on employees
- Making life unpleasant for those who object
- Dismissing employees suffering from stress as “weak”
- Executives encourage employees to target others
- It’s “a few bad apples.”

Bullying At Work... by the Numbers

- 60.3 million U.S. workers are affected
- 70% of perpetrators are men
- 61% of bullies are bosses
- 66% of targets are women
- 40% of targets suffer adverse health consequences
- 29% of targets remain silent; only 17% seek formal resolution

Source: 2017 Workplace Bullying Institute

Impact of Bullying on Employees

Health Risks

- Stress
- Anxiety
- Panic attacks
- Trouble sleeping
- Higher blood pressure
- Ulcers

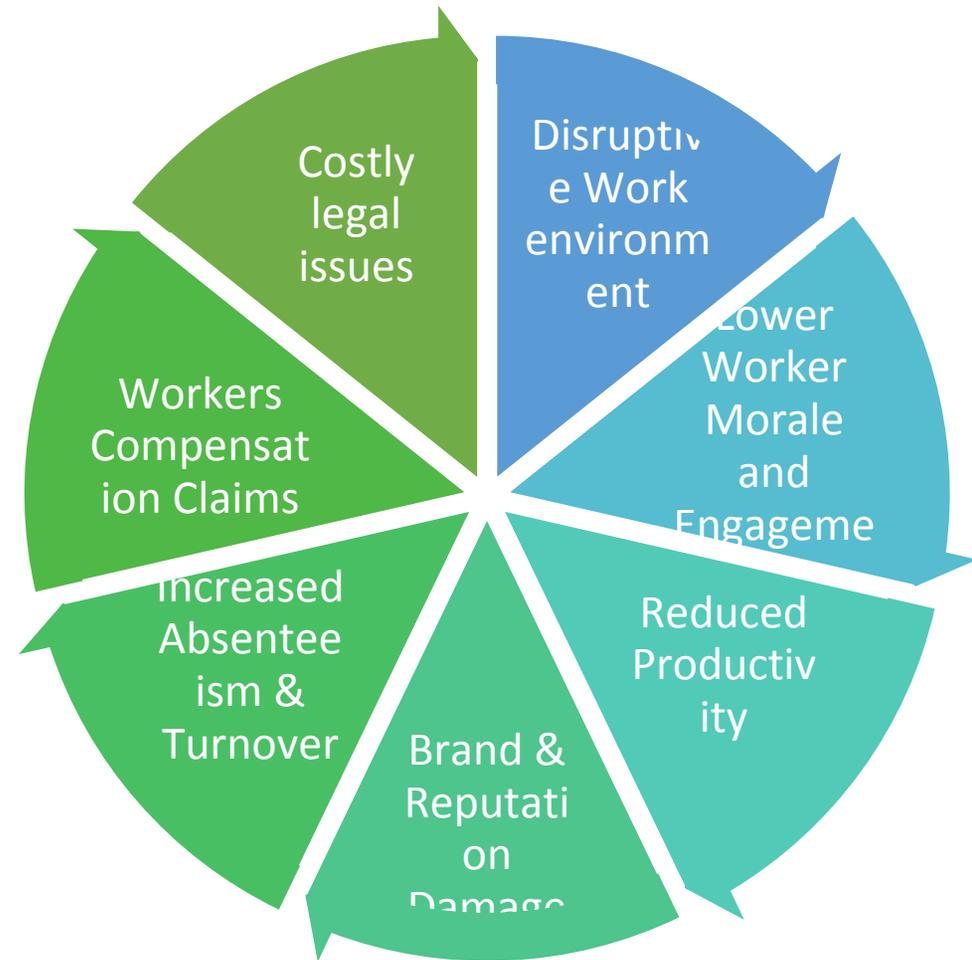
Job Performance

- Having trouble making decisions
- An incapacity to work or concentrate
- A loss of self-esteem
- Staying home

Lower productivity

- Defending themselves
- Avoiding the bully
- Networking for support
- Ruminating about the situation
- Planning how to deal with the situation
- Distrust among co-workers

Impact of Bullying on Organizations





The Cost of Bullying

\$6,000,000,000 to
\$13,000,000,000
per year

Source: Workplace Bullying Project Team at Griffith University



Organizational Inaction

- Afraid to confront the bully
- Traditional conflict resolution tools don't work
- No accountability but rather endorsement
- Fear of lawsuits...from the bully
- Use of euphemisms trivialize the issue
- 40% of employees don't come forward

What can your organization do?

- Policy and Training
- Demonstrated commitment from the top
- Raise awareness on what bullying is and what it looks like
- Leadership Accountability and Zero Tolerance
- Track behaviors, issues, turnover to proactively identify problematic employees or managers
- Encourage reporting. Share what to expect with all levels.
- Investigate complaints promptly, consistently and comprehensively.
- Be transparent in outcomes as appropriate.





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Crafting policies and action plans
designed to minimize bullying

Proactive Measures and Response

Civility Policies/ Codes of Conduct

- Some harmful bullying behaviors that aren't technically unlawful harassment can be addressed in a workplace civility policy.
- While there are no general civility or anti-bullying laws in place at the federal or state levels, companies that want to vanquish bullying in the workplace can adopt their own guidelines or codes of conduct.
- Civility policy statement might assert that all people, regardless of race, gender, background, belief system or position in the company, will be treated with respect, dignity and civility.

Civility Policies/ Codes of Conduct

- In addition, the policy should state that any type of bullying that demeans, diminishes, defames or belittles a person through rumors, lies, devious and selfish acts, derogatory comments about others, antisocial or aggressive behavior, or any acts that create a hostile work environment will not be tolerated.
- Stress the fact that when an employee complains he or she is being targeted, your company will take this complaint seriously, investigate it thoroughly, and will follow human resources protocol as mandated by federal law regarding consequences for the abuser.

A policy and is one thing...but what more can be done?

Training on policies, and train your managers and supervisors so they recognize and respond to bullying behaviors in the workplace

Dealing with the Bully

Response to complaints should be taken seriously and problematic behaviors effectively managed

Managing the Bully

Overview

Overview:

- Avoidance is a major culprit...because it is anxiety-provoking and difficult work and the bully has more time and energy
- So who will lead and make sure the problem is addressed and resolved?

Be savvy, muster up, & join forces.

Small victories send a message.

Seven Strategies for Effective Performance (Behavior) Management

- Proper foundation
- Good facts- INVESTIGATE
- Evaluation & Planning
- Advice
- Effective discussions
- Benchmarking & monitoring
- Documentation

Lay a Foundation for Good (behavior) Performance

- Treat respectful and professional behavior as a core aspect of performance (“performance” and “behavior” as integrated)
- Set clear expectations of employee behavior
- Robust policies: Anti-Harassment, Civility in the Workplace, Drug Use, Codes of Business Conduct, Anti-Bullying, etc.
- Job descriptions, training
- Everyday actions
- Messaging from the top!
- Provide clear venues for reporting problems: Act promptly & vigilantly to enforce those standards
- Apply rules evenly across employee ranks-NO EXCEPTIONS!

Rules and “rank”

- Rank confers privilege and stature, but not an exception to behavioral standards
- The higher the rank, the more important the behavior becomes in terms of visibility and impact; the impact becomes “magnified”
- Organizational “tone” is set at the top: studies show that subordinates (indeed an organization) will mimic the behavior of high-ranking employees
- Become convinced and persuasive in your efforts to curb bad behavior at all levels
- And yes, organizational cultures change slowly and some people are intractably protected

Two. When problems Arise...Investigate

- Good Decision-making depends on reliable facts
- Facts should be gathered thoroughly, fairly, accurately, and objectively
- As an organization, you must:
 - Act based on a reasonable belief,
 - Generated by adequate information, and
 - Gathered in an effective and unbiased fashion
- Of course, a good investigation will include confronting the problem employee

Identify & Appropriately Describe Problematic Behavior

- Focus on the *behavior*, rather than the underlying intent, cause assumptions, or suppositions about the motive, etc.
- Adopt a relevant, *work-centered vocabulary*
- Determine the *impact*
- Remain alert to potential *legal consequences* and *policy violations*

Compare:

- “Tom has a tough management (or communication) style. Subordinates cower around him; they practically shake in their shoes. He’s one of those brilliant mad-scientists-all brains, but no interpersonal skills. People run the other way when he is ‘in one of his moods’ but he means no harm. Tom is ‘just Tom’”

Compare:

- “Tom is a huge asset in terms of the research he’s conducted and the prestige he’s brought to the university. He is extremely loyal. However, he persistently engages in angry, erratic, and berating behaviors towards junior faculty and staff members. For example, last week during a discussion with a TA, he raised his voice, got red in the face, stood up, and threw his pen straight at the TA’s face. The 5 people I spoke with all said the behavior occurs often, and often for no reason. All are waiting for the first opportunity to leave the department. They feel undervalued and just don’t trust him to make fair performance decisions and to support their career advancement. A prospective faculty member-long recruited by the university-declined an offer last year based on Tom’s poor reputation.”

Three. Get Needed Support

- Appropriate colleagues in your organization, such as HR representative
- Legal Counsel
- Investigating
- Documenting
- Legal issues at play: discrimination, harassment, ADA
- Follow appropriate protocols to seek input; e.g.:
- Threat assessment team- if concern about violence potential go to threat assessment protocol

Four. Evaluate and Decide Upon the Appropriate Response

- Remedial Action
- Based on adequate and properly-gathered facts
- Prompt/timely
- Proportionate with violation and appropriate in light of surrounding circumstances
- Consistent with the handling of similar or analogous situations; fair
- In compliance with applicable policies and CBAs

Appropriate Response, cont'd

- Factors to consider in determining appropriate remedial action”
- Type of behavior
- Frequency and duration
- Severity
- Current and possible impact of behavior
- Nature of past efforts, if any, to address problems with the employee, and results of those efforts
- Chance, if any, employee has been given to improve behavior
- Past practices in addressing similar behavior (**and its effectiveness**)

Appropriate Response, cont'd

- Nature of Remedial Action
- Informal coaching and feedback
- Progressive discipline, consistent with your policies and terms of CBAs
- Termination
- Assistance to the employee (EAP, coaching, LOA, etc.)
- Assistance and follow-up with affected work groups

Five. Hold Effective Counseling/Disciplinary Meetings

- Choose a good location for a private meeting
- Set a serious and firm tone
- Explain, elaborate on, emphasize
- As many specifics of the confirmed behavior as possible
- Employer's expectations for behavior, with reference to relevant policies
- How the effective employee has fallen short of standards
- How the behavior has undermined the employee's performance and credibility with the organization
- A plan for improvement and timeline for improvement
- Consequences for failure to improve (what does the employee stand to lose?)

Six. Benchmark and Follow Up

- The key to dealing with problematic behaviors is setting clear expectations, and “limit setting”
- Expectations for improvement should be realistic and appropriate (and you need to stick to them)
- Even when things appear to be “resolved,” monitoring is often advisable

Seven. Document your Efforts

- Form of documentation, e.g.,
 - Performance evaluation
 - Disciplinary memos
 - Performance improvement plans
- Content
 - Include complete relevant history
 - Keep tone objective
 - Reference relevant company policies
 - Retain a clear, precise message
 - Double-check accuracy
 - Describe expectations for improvement
 - Timing/follow-up
 - Consequences for failure to improve

A Note about Good Management

- Management and HR approach must be linked
 - coordinated
 - consistent
 - firm
 - progressive

Targets will not report and reveal problems unless they observe the above good practices. Actions speak louder than words.

Actions create culture

Involved, affected supervisors and managers need to be educated and made aware

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TEAMING WITH
EMPLOYERS
TO BUILD A
BETTER
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Law

- U.S. Supreme Court has recognized that Title VII and other anti-discrimination laws **do not create “a general civility code for the American workplace”**
 - Oncale v. Sundowner Offshore Servs., Inc. 523 US 75, 80 (1998)
- Courts generally dismiss claims of “bullying” where there is a lack of nexus to protected class status
- Theories include discrimination, retaliation, negligence, emotional distress, state criminal law claims, and OSHA claims.

Discrimination

- African-American employee was confrontational and rude to white co-worker
- He got in white employee's face "nose to nose"
- He intentionally dropped a 940-pound steel coil on white employee's foot
- White employee brought reverse race discrimination case
- Court recognized co-worker as a "workplace bully" but affirmed summary judgment for employer due to lack of evidence the behavior occurred because of race

- o Yancick v. Hanna Steel Corp., 653 F.3d 532 (7th Cir. 2011)

Discrimination

- Male supervisor often yelled, used profanity, threw objects and made physical threats
- Male employee also “was subjected to extensive verbal abuse, cursing, threats, and had a piece of paper thrown at his face”
- Mixed-gender group of employees brought multi-count claim, including gender discrimination
- Court dismissed finding “[the supervisor’s] actions were certainly inappropriate, but this does [not] establish a Title VII claim absent the intent to target a specific gender.”
 - Street v. U.S. Corrugated, Inc., 2011 WL 304568 (W.D. Ky. Jan. 25, 2011)

Discrimination

- Black, Puerto Rican terminated employee claimed hostile work environment based on a co-worker spreading rumors about his juvenile conviction and three racial remarks by co-workers:
 - “A bunch of Puerto Ricans” had caused the scar on his neck
 - “I bet it was a bunch of Puerto Ricans” that had injured another employee
 - The problem with Reading, PA is that there are so many Puerto Ricans
- Court granted summary judgment for employer where employee failed to show the comments, while offensive and inappropriate, interfered with his work performance
 - *Acosta v. E. Penn Mfg. Co.*, 2015 WL 5729239 (E.D. Pa., Sep. 30, 2015)

Discrimination

- Long-time employee claimed co-workers bullied him for being deaf
- Taunting him
- Making obscene gestures at him in mockery of sign language
- Disparaging him to supervisors
- Employee transferred to another facility and brought hostile work environment claim
- Court denied employer's motion to dismiss hostile work environment claim where allegations were "sufficient to show that he labored under an abusive atmosphere that seriously altered his working conditions"
 - Mehan v United Parcel Service, 2019 WL 1370096 (USDC D.Md June 25, 2019)

Retaliation

- Over a period of years, Ecuadorian employee had numerous hostile interactions with co-workers, including
 - Called anti-Latino names such as “Mexican piece of sh**”, a Mexican burrito, Ecuadorian chihuahua, Ecuadorian Speedy Gonzalez”
 - Found anonymous harassing notes in his locker
 - Threatened that a co-worker would “send [his] body to Ecuador in a coffin”
 - Punched in the face
- Employee repeatedly complained to HR, management and State Division of Human Rights
- Company thereafter installed a hidden camera in the workplace pointed directly at employee
- Jury rejected underlying disability, race and national origin discrimination claims but found for plaintiff on retaliation claim
- Court upheld jury verdict
 - Mendez v Starwood Hotels & Resorts Worldwide, Inc., 746 F. Supp. 2d 575 (S.D.N.Y. 2010)

Negligence

- Estate of a deceased employee brought claims alleging employee took his own life as a result of company's negligence in hiring supervisor who had reputation for behaving in a "racially insensitive, harassing and abusive" manner
- Supervisor engaged in abusive behavior including
 - Moving employee's desk into chemical supply closet
 - Advising employee that he was the new "sheriff in town" and mocking how Hispanics pronounce that word
 - Intentionally placing dirty paper towels on his desk and monitor
 - Making other "humiliating and derogatory comments" regarding Hispanic employees
- Court dismissed negligence claims (hiring/retention/supervision) for failure to establish the bullying conduct was based on membership in a protected class
 - *Melendez v. Figler*, 2018 WL 1305342 (N.Y. Sup. Ct. Mar. 13, 2018)

Emotional distress

- Supervisor engaged in lewd and rude conduct toward employee, including
 - Calling at 3AM to browbeat him
 - Intentionally calling his current wife by his former wife's name
 - Not allowing him time off to be with his wife at the hospital following the birth of his son
 - Causing him needlessly to cancel vacation plans
 - *Mirzaie v. Smith Cogeneration, Inc.*, 962 P.2d 678 (Okla. Civ. App. Div. 1, 1998)
- Attorney engaged in “childish behavior” toward legal secretary, including
 - Glaring at her
 - Slamming doors
 - Crying
 - Snatching messages from her hand
 - *Turnbull v. Northside Hosp., Inc.*, 220 Ga. App. 883 (Ga. App. 1996)
- In both cases, court found the claims did not rise to the level of severe or outrageous behavior necessary to make a claim of emotional distress

Emotional distress

- Playwright and associate producer had romantic relationship that ended during the course of the employment
- During the following 2 years, he fired and promptly rehired plaintiff 12 to 40 times
- He called her 10 to 30 times per night
- He yelled at her and stalked her inside and outside of work
- He left her messages that he hated her and wished her dead
- Court found “[n]o one should have to put up with such abuse”
 - *Bristow v. Drake St. Inc.*, 41 F3d 345 (7th Cir. 1994)

Criminal claims

- Assault

- Perfusionist alleged assault by surgeon who
- “aggressively and rapidly advanced on [him] with clenched fists, piercing eyes, beet-red face, popping veins, and screaming and swearing at him”
- Court upheld \$325,000 jury verdict
 - Raess v. Doescher, 883 N.E.2d 790 (Ind. 2008)

- Menacing by stalking

- Employee alleged menacing by stalking against supervisor who
- yelled, pointing finger in employee’s face and threatened to terminate her
- Court found menacing by stalking requires more than “a boorish and overbearing supervisor whose conduct was purely work-related”
 - Darden, et al. v. Fambrough, 5 N.E.3d 712 (OH Ct of Apps 2013)

OSHA/state general duty clause violations

- Employee alleged harassment, bullying and other behavior by supervisor that led her to quit
- Court allowed claim to proceed despite lack of physical injury
- Stanley Black & Decker, Inc. v Krug, 2015 WL 3522022 (CT Sup. Ct May 7, 2015)
- Employee alleged intimidation, humiliation and offensive statements by CEO that led her to quit, including suggestion that she might improve sales if she would have sexual relations with client
- Court rejected claim because the injury was emotional, not physical
 - *Gonzalez v Lecoq Cuisine Corp. et al.*, 2015 WL 2166662 (CT Sup. Ct April 8, 2015)

Use of experts

- Testimony may be solicited from an expert about
 - what workplace bullying is
 - that workplace bullying can cause severe mental and physical distress
 - that plaintiff was subject to workplace bullying by defendant
 - that such bullying could reasonably be expected to cause plaintiff to suffer physical and mental harm
- Such testimony has been both
 - **Allowed:**
 - Psychologist characterized surgeon's conduct as workplace bullying
 - Defendant failed to object at trial to admission of testimony as junk science
 - *Raess v. Doescher*, 883 N.E.2d 790 (Ind. 2008)
 - **Excluded:**
 - Expert in workplace bullying proffered to testify that plaintiff was subjected to severe and pervasive workplace bullying which could cause physical and mental harm
 - *Garity v. APWU-AFL-CIO*, 2017 WL 34961464 (D. Nev., Aug. 15 2017)