Use this guide to:

- Understand trends in workplace bullying
- Recognize who’s most at risk for being bullied
- Learn how to prevent and respond to workplace bullying
- Utilize templates to create a policy and conduct workplace training

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Author: Beth P. Zoller, JD, XpertHR Legal Editor

Statistics Show Bullying on Rise

Recent surveys and statistical data show that instances and reports of workplace bullying are on the rise and has become a serious workplace issue that must be addressed. A 2014 Workplace Bullying Institute (WBI) survey shows that 27% of Americans have suffered serious bullying and abusive conduct at work (defined as repeated abusive conduct that is threatening, intimidating, humiliating, work sabotage or work abuse). Further, another 21% of workers have witnessed it, an increase from 15% just a year ago. Overall, 72% of workers are aware that workplace bullying happens.

These numbers reinforce a 2012 CareerBuilder survey in which 35% of workers said they felt bullied at work, an increase from 27% in 2011. Further in 2011, a study by the Harvard Business Review reported that 50% of employees surveyed believed that they were treated rudely at least once a week, up from 25% in 1998 and SHRM's 2012 workplace bullying survey found that 51% of the employers surveyed had incidents of bullying in their workplaces.

Everyone is a Potential Target

Recent research further demonstrates that no one is immune from workplace bullying and it affects individuals of all races, ages, and sexes. However, some individuals are more likely to experience workplace bullying than others. The 2014 WBI survey shows that Hispanics report the highest rate of bullying (57%) while African-Americans report 54%.

Additionally, 60% of bullied targets are women while 40% are men, according to the WBI research. WBI research also shows that 69% of bullies were men as compared to 31% of women, but that women bullied women in 68% of cases. Furthermore, older workers tend to be targets of workplace bullying more often than their younger colleagues, according to 2013 data from WBI. The average age of a bullied target is approximately 42 years old. Individuals in their 40s comprised 30% of all targets, individuals in their 50s comprised 26.4% of all targets, individuals in their 30s comprised 18.9% of targets and those under 30 comprised 21.3% of all targets.

Employer Responses are Inadequate

US employer response appears to be lagging this trend. Employers are neither preventing workplace bullying nor responding adequately when complaints are made. In fact, according to a 2012 survey by the WBI, only 5.5% of employers had a workplace policy that addressed bullying in any way and of this only 2.5% had a separate antibullying policy while 3% had a respect or incivility policy that acted as a deterrent to bullying. Approximately 62% of employers lacked any policy to address workplace bullying. SHRM's survey had similar findings: 44% of the companies did not have a workplace bullying policy (and no plans to institute one); 40% said their bullying policy was part of another workplace policy, 13% percent planned to put a policy in place within a year, and 3 percent had a stand-alone bullying policy.

Studies by the WBI show that when targets of workplace bullying complained to HR, only 2% were satisfied with the resolution. In the majority of cases either no action was taken, or the victim lost their job or suffered retaliation as a result of having complained. Further, 2014 WBI research shows that 72% of workers state that employers either deny, ignore, or minimize concerns regarding bullying. Specifically, 25% of employers deny workplace bullying and fail to investigate complaints while another 11% defend it when offenders are executives and managers and 16% discount it because they believe its impact is not serious. In addition, 15% of employers rationalize it as an innocent, routine way of doing business while another 5% actually encourage it as necessary for a competitive organization. WBI research shows that a mere 28% of employers address it in any
manner. Statistics show that only 10% of employers acknowledge workplace bullying and show concern for affected workers while 12% take steps to eliminate it by creating and enforcing policies and procedures and only 6% condemn it and show a zero tolerance for workplace bullying. While SHRM’s survey indicated that 2/3 of companies had a grievance process for investigating and addressing bullying allegations, 74% said they did not conduct regular bullying prevention/awareness training.

Employer Preparation is Essential

Given these sobering trends and statistics, it is essential for employers to be prepared for workplace bullying for a number of reasons.

- **Bullying Affects All Employers.** Bullying is present in every workplace, so all employers must be prepared to deal with it. From recent allegations by rookie Miami Dolphin football player Jonathan Martin of bullying and hazing by his teammate Richie Incognito to allegations that workplace bullying at the University of Virginia from his boss led The Virginia Quarterly Review’s managing editor to commit suicide, no workplace is immune. In fact, recent research conducted by the WBI in 2013 shows that bullying permeates all industries, with a high number of cases reported in the education, health care and public service/government sectors. Therefore, all employers need to understand what bullying entails and how it can surface in the workplace.

- **Bullying Is Hard to Define.** Bullying is hard to define because it covers a wide range of conduct and behavior. Simply put, bullying is any activity intended to diminish or disempower another individual and any use of aggressive, hostile, abusive or unreasonable conduct against a co-worker or subordinate. Bullying can take many forms and can involve physical threats, hostile words or any actions intended to interfere with an employee’s work. An employer needs to recognize that bullying is different from ordinary workplace incivility and rudeness because it is intentional, frequent, repetitive and severe often resulting in a pattern of abusive and offensive behavior.

- **No US Law Explicitly Prohibits Workplace Bullying.** It is important for an employer to effectively respond to workplace bullying because currently there is no law in the US that explicitly prohibits workplace bullying and abusive conduct alone. While state and federal harassment laws prohibit bullying and harassment that occurs because an individual is a member of a protected class (i.e., race, sex, sexual orientation), if an individual is not in a protected class, the employee has no statutory recourse under state or federal law. In such cases, victims must resort to common law theories of liability for emotional distress, assault, battery, and negligent supervision. However, it is important to note that the Healthy Workplace Bill has been introduced in more than 25 states over the past decade. This bill seeks to provide legal relief for bullying victims as well as legal incentive for employers to prevent and respond to workplace bullying and abusive treatment. It would require employers to provide a safe and productive workplace for all employees. Notably, the US has not kept pace with the rest of the world and other countries, such as Australia and Canada, have enacted legislation to address the growing issue of workplace bullying and abusive environments.

- **Bullying Comes at a Cost.** Workplace bullying presents a wide variety of risks to employers and often results in significant liability. Bullying can lead to decreased employee productivity and morale, workplace violence, workers’ compensation claims and health care costs, absenteeism and potential lawsuits for negligent hiring, internal infliction of emotional distress, assault and battery.
Workplace Bullying Toolkit

An antibullying program is advised for all workplaces, that minimizes the high cost of workplace bullying and the dangers it presents, and should include the following:

1. **Workplace Bullying Policy.** A critical part of an antibullying program is an effective policy that puts employees on notice that abusive and offensive behavior will not be tolerated. The policy should plainly define acceptable and unacceptable behavior and provide clear examples. It should also provide for a multichannel procedure to report complaints in confidence and an assurance that those complaints will be firmly addressed and investigated by the employer. It should assure employees that there will be strict consequences for those who violate the policy and bullies will be disciplined and terminated if necessary. Complainants should be reassured that they will suffer no retaliation as a result of bringing a complaint. The policy should be communicated to all employees and placed in an employee handbook and either posted in a common workplace area or on the employer’s intranet.

   A template for a [Workplace Bullying Policy](#) is included as Appendix I.

2. **Antibullying Training.** It is important for employers to provide comprehensive training to all employees and supervisors regarding the employer’s antibullying program and educate employees on the dangers of bullying and how it is detrimental and disruptive to the workplace. The training should review the requirements of the workplace bullying policy as well as coach employees on sensitivity, tolerance and a mutual respect for others. Training should be interactive and present hypothetical workplace situations in order to encourage employees to think about their interactions with co-workers. Both supervisors and employees should be trained to identify bullying conduct and bring it to the employer’s attention since victims may be fearful of lodging complaints. Employees should be warned that joking, teasing, horseplay and usual workplace banter can quickly escalate and lead to workplace bullying. Supervisors and management should lead by example and foster an atmosphere of diversity, inclusion and respect.

   A [Bullying and Harassment Supervisor Briefing](#) to help train supervisors is included as Appendix II.

3. **Complaint Procedure.** Employers should be vigilant about responding to all allegations of bullying and promptly investigate. As part of the investigation, the employer should gather any relevant documents including emails and interview all possible witnesses including the complainant the alleged bully as well as any third-parties who may have witnessed the bullying behavior. It is essential for an employer to document the investigation process as this may serve to protect the employer in the event of a lawsuit by demonstrating that the employer took affirmative steps to respond to the allegations and remedy any abuse.

4. **Enforcement.** Employers must demonstrate that they will go beyond just having a policy in place, but that they will enforce the antibullying policy and offenders will be disciplined and terminated if necessary. Employers should convey that all employees will be treated equally under the policy and high level managers or supervisor will not receive special treatment from the employer. Employers may want to consider offering employee assistance programs and mental health resources to victims so that they can coach and counsel them while providing the needed help and support. Further, employers should be
prepared to make changes to the work environment which will decrease the instances of bullying such as separating the bullying and his victim.

A “How To” Guide on Preventing Workplace Bullying is included as Appendix III.
APPENDIX I

Workplace Bullying Policy

Author: Beth P. Zoller, JD, XpertHR Legal Editor

When to Use

Workplace bullying and harassment can have a detrimental effect on the workplace as such conduct cause a loss in employee productivity, increase the likelihood of lawsuits, undermine employee morale, cause workplace violence and hostility as well as a lack of trust in the employer, supervisors and co-workers. Bullying can increase the employer’s health care costs as well as workers’ compensation claims.

To avoid such claims, employers should be proactive and enact and implement workplace policies and procedures to combat bullying and harassment and create a more tolerant workplace. A bullying policy will put employees on notice that bullying, abusive and offensive conduct is not permitted and will have serious consequences. Such a policy should specifically detail what type of conduct is prohibited and provide clear examples. It should also specify a clear reporting procedure and that the employer will promptly respond to any complaints.

Below is a model policy that should be further tailored to fit the employer’s specific needs

<table>
<thead>
<tr>
<th>Bullying Policy</th>
</tr>
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<tbody>
<tr>
<td><strong>Bullying Prohibited.</strong> [Enter Employer Name] strictly prohibits workplace bullying and abusive conduct. [Enter Employer Name] defines bullying as repeated activity that is meant to diminish or disempower another individual and any use of aggressive, hostile, abusive, harassing or unreasonable conduct against another individual.</td>
</tr>
</tbody>
</table>

| |
| It occurs when a person uses strength or influence to intimidate another, typically to force a desired act or result. |

| |
| Bullying can involve physical threats, verbal conduct such as hostile or taunting words, or any action intended to interfere with an individual’s work. |

| |
| Bullying at work takes the form of actions that are: |

- Threatening, aggressive or intimidating;
- Abusive, insulting or offensive;
- Cruel or vindictive; or
- Humiliating, degrading or demeaning. |
Examples of Bullying Conduct. Bullying conduct includes, but is not limited to the following:

- Using intimidating tactics and threatening an employee's professional status
- Making derogatory remarks, insults and epithets
- Engaging verbal or physical conduct that a reasonable person would find intimidating, threatening or humiliating
- Sabotaging the work of another employee and thereby undermining their performance;
- Belittling and discounting an employee’s opinion and humiliating an employee in front of others
- Making inappropriate jokes at another employee's expense
- Overworking an employee and making unreasonable demands and deadlines which set the employee up for failure
- Failing to acknowledge an employee’s positive contributions
- Isolating the employee from work meetings or social activities
- Singling the employee out and not treating him or her the same way as other employees
- Retaliating against an employee for claiming about unfair treatment, harassment or discrimination
- Micromanaging and excessively monitoring an employee's work and not trusting an employee's work product
- Using verbal, offensive or obscene gestures
- Spreading malicious gossip and rumors about an employee

Zero Tolerance Policy for Bullying and Harassment as of [date]. [Enter Employer Name] will not tolerate any behavior that is intended to bully, harass, mistreat or abusive another individual.

As a part of [Enter Employer Name]'s commitment to a safe, healthy, and productive working environment, [Enter Employer Name] will discipline anyone who, at work, engages in either bullying or harassment when that behavior has the effect of unreasonably interfering with an individual's work performance or when it creates an intimidating, hostile, or offensive work environment.

This behavior includes, without limitation:

- Using [Enter Employer Name]-owned equipment to create, forward, or transmit materials (such as emails) that are disruptive, abusive, obscene, or degrading, including racial slurs, ethnic jokes, lewd or sexual jokes, negative or derogatory stereotypes, names, or labels that a reasonable person would find offensive;
- Making sexual advances, asking for sexual favors, or engaging in other unwelcome physical or verbal conduct of a sexual nature; and
- Intentionally intimidating, degrading, or humiliating another.

This is a zero tolerance policy, and any violation of this policy may result in immediate discipline, up to and including termination.
Tips

It is critical for employers to adequately communicate the policy to all employees and supervisor as well as provide training on it. Employees and supervisors should know that any abusive, harassing or bullying conduct will result in serious consequences. Additionally, supervisors should be trained to identify potential bullying in the workplace before instances escalate.

There is a possibility that seemingly innocent workplace gossip and taunting may escalate to extremely violent assaults. Supervisors should be trained to be aware of such conduct and intervene when they observe a pattern of conduct before it escalates to serious violence. Further, it is a good idea to have a multichannel reporting structure so that individuals may bring complaints to more than one person. This can be especially effective if the bullying is taking place between supervisors and subordinate and the subordinate will feel uncomfortable confronting the supervisors about the bullying behavior.

As with any policy, consistent application is critical. Therefore, an employer should be sure to take all complaints of bullying not matter how small seriously and promptly investigate to see if there is any merit. An employer should not hesitate to impose discipline, even if the bully is a high level employee or supervisor.

Warnings

Employers should be aware that a significant number of state lawmakers are seeking to Healthy Workplace Bill in the works which will address workplace bullying and attempt to fill the gap between federal and state civil rights law. Right now, individuals have no legal resource under statute for harassment and bullying that is not based on an individual’s membership in a protected class. The Healthy Workplace Bill would provide such individuals with relief and incentivize employers to respond promptly to any complains of abusive behavior with immediate action. Employers should be aware of any changes and developments with respect to bullying legislation.
APPENDIX II

Supervisor Briefing on Bullying and Harassment

Author: Sahara Pynes, HR Solutions Group/Training Mavens

This Supervisor Briefing examines the law and best practices regarding bullying and harassment in the workplace, as follows:

1. Recognizing Bullying
2. Recognizing Harassment
3. Prevention Techniques
4. Conducting Investigations
5. Employer Liability
6. Test Yourself

Recognizing Bullying

Bullying occurs when a person uses strength or influence to intimidate another, typically to force a desired act or result. Workplace bullying is similar in nature to schoolyard bullying, but must be handled within the confines the workplace. There is no specific standard legal definition for what constitutes bullying, nor is there specific federal legislation in the United States that prohibits workplace bullying. However, nearly half the states have introduced legislation called the Healthy Workplace Bill, which would prohibit bullying, but the bill has yet to become law in any one state. Accordingly, supervisors should be cognizant of the types of behavior that could subject an employer to liability under other existing legal theories.

Bullying at work takes the form of actions that are:

• Threatening, aggressive or intimidating;
• Abusive, insulting or offensive;
• Cruel or vindictive; or
• Humiliating, degrading or demeaning.

It is generally accepted that such behavior must have malicious intent and be repeated.

Did you know?
The majority of reported bullying cases are perpetrated by supervisors and managers who abuse their power.
Behaviors that may be construed as bullying include:

<table>
<thead>
<tr>
<th>Peer to Peer</th>
<th>Supervisor to Subordinate</th>
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<tbody>
<tr>
<td>Staring or glaring, in a manner that is intimidating and clearly shows hostility</td>
<td>Creating unrealistic or unachievable demands (workload, deadlines, duties) for an individual or singling an individual out</td>
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<tr>
<td>Discounting an individual's thoughts, ideas or feelings (&quot;oh, that's a stupid idea&quot;) in meetings</td>
<td>Falsely accusing an employee of errors not actually made</td>
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<tr>
<td>Stealing credit for work done by others</td>
<td>Declaring an employee insubordinate for failing to follow arbitrary requests</td>
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<tr>
<td>Invoking the silent treatment, blatantly ignoring a co-worker's views or comments, or purposely excluding a co-worker from work-related or social activities</td>
<td>Contributing to failure of an employee's project by not performing required tasks, such as sign-offs, taking calls, working with collaborators</td>
</tr>
<tr>
<td>Deliberately withholding vital work-related information or sabotaging a co-worker's contribution in order to cause embarrassment</td>
<td>Repeated unfair criticism or destructive and negative criticism that focuses on blame rather than future improvement</td>
</tr>
<tr>
<td>Personal insults, screaming or public humiliation</td>
<td>Personal insults, criticism, screaming or public humiliation</td>
</tr>
<tr>
<td>Spreading rumors or gossip or making false allegations about a co-worker in order to discredit him or her</td>
<td>Excessive or overbearing monitoring of a particular employee's work without good reason</td>
</tr>
<tr>
<td>Physical shoving or other incidents</td>
<td>Ordering a particular employee to work below his or her level of ability, or to perform mundane or demeaning tasks, without proper reason</td>
</tr>
<tr>
<td>Playing practical jokes on a co-worker (but only if repeated or with malicious intent)</td>
<td>Removing an employee's responsibility without consultation and legitimate business justification</td>
</tr>
<tr>
<td>Aggressive or intimidating behavior towards a co-worker, especially if displayed in front of others</td>
<td>Threatening an employee with a negative employment action-demotion, poor review or dismissal.</td>
</tr>
</tbody>
</table>
Recognizing Harassment

While bullying may occur for an arbitrary reason or no reason at all, unlawful harassment occurs when the behavior is predicated on a protected characteristic. Federal law protects the following characteristics:

- Age
- Disability
- Genetic Information
- National Origin
- Pregnancy
- Race/Color
- Religion
- Gender and Sex
- Veteran or Military Status

Remember

State laws may protect additional traits. Supervisors should check their local harassment laws.

Establishing a Harassment Claim

In order to file a claim of harassment, the employee must be:

1. A member of a statutorily protected class;
2. Subjected to unwelcome verbal or physical conduct related to his membership in that protected class;
3. The unwelcome conduct complained of was based on his membership in that protected class; and
4. The unwelcome conduct either:
   a. Affected a term or condition of his employment; and/or
   b. Had the purpose or effect of unreasonably interfering with his work performance; and/or
   c. Created a hostile work environment (Conduct that is sufficiently severe or pervasive to create a work environment that a reasonable person would consider intimidating, hostile or abusive.)

Did you know?

Intent of the harasser is not a factor in the determination of whether unlawful harassment occurred. Rather, whether the work environment is subjectively and objectively hostile is relevant.

Accordingly, the same types of behavior that constitute bullying may also constitute unlawful harassment if the target is chosen based on a legally protected trait.

Remember

There is both a subjective and objective component in determining what constitutes harassment. A court will look at the totality of circumstances and whether a reasonable would view the work environment as hostile.
Employer Liability

Liability for Bullying

With respect to bullying that is not tied to an individual’s membership in a protected class, there is not yet a federal or state law to address workplace bullying. However, a victim of workplace bullying may seek to sue the alleged wrongdoer and the employer for unlawful injury and may bring suit for various causes of action, including, but not limited to, negligent hiring, negligent retention, intentional infliction of emotional distress, assault, battery, defamation, intentional interference with business relationship and workers’ compensation claims. However, it is important to note that employers may not be held liable for every incident of bad behavior in the workplace. Employers and supervisors should be sure to consult their state law and keep abreast of any developments in this regard.

Liability for Harassment

In general, employers are subject to liability for harassment committed by both supervisors and non-supervisors, unless the employer can establish that it had no reason to know of the harassment or knew of the harassment and took reasonable measures to prevent and correct it.

Employer liability for harassment differs depending on whether the alleged wrongdoer is a supervisor or a non-supervisor, which could include a co-worker or a third-party.

Supervisory Harassment

If the harasser is a supervisor, it is far more likely that an employer will face liability for the supervisor’s actions. In order to be considered a supervisor, an individual must have the power to take tangible employment actions. The reason for this liability is because actions and knowledge of a supervisor are imputed to the employer.

Non-Supervisory Harassment

When the harasser is a non-supervisor, an employer is liable if it knew or should have known of the misconduct, unless it can show that it took immediate and appropriate corrective action. Non-supervisors include lower level employees and third-parties, including:

- Co-workers;
- Customers;
- Vendors; and
- Independent contractors.

An employer may be deemed to be on notice of an employee’s harassment when the supervisor or other management employees are aware of prior instances of harassment of others by the same individual, even if the alleged victim never
complained. Alternatively, an employer may receive notice from someone other than the actual victim, such as a co-worker that harassment is occurring. Accordingly, supervisors need to be proactive when they suspect harassment has occurred and take steps to remedy the situation.

**Tangible Employment Action**

A tangible employment action occurs when a supervisor’s harassing conduct results in a significant change in employment status. Tangible adverse employment actions may go well beyond pure terminations, and can include:

- Hiring;
- Firing;
- Failing to promote;
- Reassignment with significantly different responsibilities;
- Decision cause a significant change in benefits; or
- Discipline.

Tangible employment actions usually:

- Require an official act of the employer;
- Are documented in employer records;
- Are subject to review by higher level supervisors;
- Requires the formal approval of the employer; and/or
- Uses the employer’s internal processes.

A tangible employment action is the type of action a supervisor normally is empowered to take and its effect on the victim must be tangible.

**Best Practice**

All changes in employment status, such as a transfer, compensation cut, change in office location or job duties, should be well-documented. A supervisor’s documentation should include the business rationale for the decision and whether the employee had any input or made a request for the change.

**Employer's Response to the Harassment**

If no tangible employment action is involved, then the employer can avoid liability by establishing an affirmative defense, which is comprised of two elements:

1. That the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and
2. That the employee unreasonably failed to take advantage of any preventative and corrective opportunities provided by the employer.

Thus, the employer must prove the existence of a harassment policy with a complaint procedure, and that the employee unreasonably failed to use those procedures.
Prevention Techniques

The best way for employers to prevent bullying and harassment in the workplace claims is to develop and implement a harassment policy with a well-publicized complaint procedure. The existence of a harassment policy is a simple and effective way to set expectations for workplace behavior. Employers can use employee handbooks to ensure all employees are aware of the harassment policy and agree to abide by its terms. Because supervisors have an obligation to the employer to report any knowledge of harassment and take steps to remedy the harassment, supervisors need to know the contents of the policy and abide by it at all times and in making all employment decisions. Generally, such policies will include:

- A Statement of Zero Tolerance
- A Description of Conduct That Constitutes Harassment
- A Complaint Procedure
- A Statement That the Employer Will Investigate Complaints Thoroughly and Promptly
- A Statement Regarding the Confidential Nature of the Investigation
- A No-Retaliation Statement
- Disciplinary Statement
- Formal Employee Acknowledgement and Consent
- Statement of Formal Training

In addition, to the existence of a harassment policy, an employer may choose to implement a horseplay and employee altercations policy which will address workplace bullying and hostile interactions between co-workers. It is also important for supervisors to undergo training and be sure that the employees they manage are trained in appropriate workplace behavior.

Most of all, supervisors should foster open communication, inclusion and a respectful work environment in the departments they manage in order to prevent workplace bullying and harassment.

Remember

Even if a supervisor does not think unlawful bullying or harassment has occurred, the supervisor must report it to the employer. Further, the supervisor should take great care not to retaliate against the victim.

Conducting Investigations

If a supervisor learns of potential bullying or harassment in the workplace, the supervisor should work with employer to take prompt remedial action reasonably calculated to end the bullying or harassment. Employers must commence an investigation whether the complaint was received from the alleged victim, a witness, a supervisor, or even through word of mouth.

Tip

An effective investigation can provide grounds for minimizing employer liability through an affirmative defense.

The role a supervisor may play in an employer investigation will vary. Generally, an effective investigation may include: Interim Measures. It may be necessary for an employer to take interim measures, such as a temporary transfer or a non-disciplinary leave of absence with pay, to avoid potential bullying or harassment during an investigation. Any changes to an
employee's work situation can be perceived as retaliatory. Accordingly, the employer should communicate that its actions will prevent continued misconduct before concluding an investigation.

- **Choosing a Proper Investigator.** The employer must choose a neutral, objective, and properly trained investigator. Remember that the investigator must be a credible and effective witness should litigation result. Accordingly, it is not advisable that the supervisor conduct the investigation as employers need to consider an unbiased investigator to ensure the integrity of the investigation if litigation might result.

- **Conducting Interviews.** An employer must interview the complainant, the alleged wrongdoer, and any relevant witnesses. Ask each interviewee the who, what, why, when, how in an effort to piece together what happened. Frequently, complaints of bullying and harassment rest on a he said, she said story where it may be difficult to assess credibility. If available, use witnesses to corroborate and clarify facts given by the complainant and the alleged wrongdoer.

- **Determining Credibility.** Because there are frequently conflicting versions of relevant events, an employer must weigh each party's credibility. In assessing credibility, the investigator should consider the following: whether the facts make sense, whether there is a motive to be untruthful, whether any facts can be corroborated by external evidence or witnesses. Supervisors of both the alleged wrongdoer and victim may be helpful in providing background information or other credibility-related assessments.

- **Reaching a Determination and Implementing Corrective Measures.** At the conclusion of an investigation, an assessment of what factually occurred and corresponding disciplinary action against alleged wrongdoer may be necessary. Generally, the corrective action should reflect the severity of the conduct and may range from a reprimand to discharge. Employers do not need to provide the complainant information about the disciplinary measures taken against the alleged wrongdoer. This information should be treated as confidential, just like other disciplinary measures.

- **Effective Documentation.** During an investigation, the employer should keep documentation of each step in the process, including determinations of credibility and the disciplinary outcome of the investigation.

**Test Yourself**

1. Bullying in the workplace is prohibited by:
   a. Federal bullying laws
   b. Individual state laws
   c. Antiharassment laws
   d. Hate crime laws

2. Erica is preparing materials that her supervisor Steven has asked for in connection with an important presentation. The day of the presentation, Steven tells other co-workers that Erica was lazy and made numerous errors in researching the information. Erica complains to HR. What should Steven do?
   a. Nothing, because Steven fosters open communication with his employees.
   b. Talk to Erica directly about what happened.
   c. Remove Erica from further department projects.
   d. Put Erica on a performance improvement plan.

3. After Dana returned from a medical leave of absence, her supervisor Jim decided that Dana should be demoted to compensate for the extra work her co-workers covered while she was on leave. Does Dana have legal claim against the employer?
a. No, because the Dana failed to complain in accordance with the employer's policies.
b. Yes, because the Jim treated Dana adversely due to a protected trait.
c. No, because the harassment only happened once.
d. Yes, because the Dana never received a poor performance evaluation.

Answers

1. **c.** Bullying is not specifically protected under any state or federal bullying laws. However, behavior that constitutes bullying may be actionable under federal or state antiharassment laws. Further, if the bullying is physical, a victim can bring an assault or battery claim.

2. **b.** Steven should talk to Erica directly about what happened in a calm and productive manner. If Steven engages in c or d, it will be viewed as retaliation for having complained to HR. By speaking with Erica about her mistakes, Steven can provide constructive criticism to address the deficient performance. However, Steven should apologize for raising these issues in front of co-workers. If Steven is uncomfortable discussing the issue directly with Erica, Steven should seek assistance from employer or HR.

3. **b.** Where a supervisor treats an employee adversely due to a legally protected characteristic and the supervisor’s behavior results in a tangible employment action, the employer will be strictly liable. In this case, Jim penalized Dana because of an implied disability by demoting her. Because Jim awful behavior, knowledge of the harassment is imputed to the employer. Thus, the employer has no defense that Dana failed to complain. Similarly, because a tangible employment action was effectuated in the demotion, the fact that it happened only once is irrelevant.
APPENDIX III

How to Prevent Workplace Bullying

Author: Beth P. Zoller, JD, XpertHR Legal Editor

Workplace bullying presents a wide variety of risks to employers including decreased employee productivity and workplace violence as well as potential lawsuits for emotional distress and negligent hiring. Therefore, it is critical for employers to be proactive and take all necessary measures to develop and implement workplace policies and procedures to eliminate workplace bullying and abusive behavior.

In order to prevent workplace bullying, employers should take the following steps:

Step 1: Understand What Bullying Is

Bullying occurs when an individual uses strength or influence to intimidate another individual, typically to force a desired act or result. Generally speaking, bullying is any activity that is meant to diminish or disempower another individual and any use of aggressive, hostile, abusive or unreasonable conduct against a co-worker or subordinate. Bullying can involve physical threats, hostile or taunting words, or any action intended to interfere with an employee's work.

Bullying may be deemed actionable discrimination and/or harassment if directed toward a member of a protected class. Bullying is different from ordinary workplace stress because it is intentional, repetitive, severe and enduring, often resulting in a pattern of abusive behavior. Further, there is usually a disparity in power between the bully and his or her victim.

Bullying at work can take the form of actions that are:

- Repetitive and frequent;
- Threatening, aggressive or intimidating;
- Abusive, insulting or offensive;
- Cruel or vindictive; or
- Humiliating, degrading or demeaning.

Examples of workplace bullying can include:

- Making derogatory remarks, insults and epithets;
- Engaging in verbal or physical conduct that a reasonable person would find intimidating, threatening or humiliating;
- Sabotaging another employee's work and thereby undermining their performance;
- Using intimidating tactics and threatening an employee's professional status;
- Belittling and discounting an employee's opinion and humiliating an employee in front of others;
- Making inappropriate jokes at another employee's expense;
- Overworking an employee and making unreasonable demands and deadlines that set the employee up for failure;
- Failing to acknowledge an employee's positive contributions;
- Isolating the employee from work meetings or social activities;
- Singling the employee out and not treating him or her the same way as other employees;
- Retaliating against an employee for complaining about unfair treatment, harassment or discrimination; and
- Micromanaging and excessively monitoring an employee's work and not trusting an employee's work product.
Step 2: Consider the Risks and Employer Liability

Workplace bullying and harassment can have a detrimental effect on the workplace and can lead to employer liability and increased costs to the employer’s business. There are a wide variety of risks to employers, including, but not limited to:

- Loss in employee productivity and employee morale;
- Workplace violence and hostility;
- Employee stress, leading to feelings of shame, humiliation, anxiety, depression and post traumatic stress disorder;
- Turnover or use of sick days;
- Lack of trust in supervisors, co-workers and the employer;
- Increased health care and workers' compensation costs; and
- Potential lawsuits, regardless of whether meritorious, for negligent hiring, intentional infliction of emotional distress and assault.

As such, employers have a significant interest in maintaining a civil and safe workplace that is free of harassment and abusive behavior.

Step 3: Be Alert for Changes in the Law

It is well-established that an employer may be held liable for workplace bullying or harassment under both federal and state laws if the bullying or harassment occurs because of an employee's legally protected characteristic (e.g., race, gender, age, disability or sexual orientation). Currently, there are no laws that prohibit workplace bullying or harassment that is not based on an individual's membership in a protected class.

Employers, however, should be aware that there is a significant movement among the states to pass a Healthy Workplace Bill that will make bullying and abusive conduct in the workplace unlawful. If passed, this legislation would fill the gap in federal and state law that leaves many victims of workplace bullying without recourse. It would provide legal relief to employees who have been victims of workplace bullying as well as provide legal incentive for employers to prevent and respond to allegations of workplace bullying and abusive treatment. It would hold employers liable for abusive conduct by supervisors and co-workers and hold individuals liable for workplace bullying.

Step 4: Develop an Antibullying Policy and Complaint Procedure

It is critical for employers to develop and implement a strict antibullying policy. Such a policy can be incorporated into a workplace violence policy or harassment policy, but it can also be a stand-alone policy. The policy should be published and communicated to all employees and supervisors as part of the employee handbook or placed on the employer’s intranet. As with any policy, consistent application is critical and it must be applied evenly to all employees regardless of their hierarchical level in the employer’s organization.

The policy should:

- Clearly define bullying behavior and include examples of prohibited conduct;
- Articulate a multichannel procedure for employees to bring complaints if they are victims of or witnesses to bullying and abusive treatment;
- Identify the individuals in the organization who will address complaints and handle them in a uniform manner;
• Communicate to employees that the employer will promptly respond to any complaints and follow up with an investigation; and
• Advise employees that there will be serious consequences for those who violate the policy and the employer will impose discipline up to and including termination if needed.

**Step 5: Train Employees and Supervisors**

Aside from having a workplace bullying policy in place, it is critical for employers to provide antibullying training on the policy to all employees and supervisors and send a clear message that bullying and abusive conduct of any kind will not be permitted. Employees and supervisors should know that any abusive, harassing or bullying conduct will result in serious consequences. Additionally, supervisors should learn to identify potential bullying in the workplace before instances escalate. Supervisors should be trained to be aware of abusive conduct and intervene when they observe a pattern before innocent workplace gossip and taunting escalates to serious violence and potential assaults.

**Step 6: Follow-Up on Complaints and Discipline Offenders**

Employers must show that they are willing to respond quickly and diligently to any complaints of workplace bullying and follow up with a thorough investigation. An employer should be sure to take all complaints of bullying seriously no matter how small and promptly investigate to see if there is any merit. Employers should also consider taking interim measures while the investigation is pending, such as suspending any employees accused of bullying behavior or separating the complainant from the alleged bully.

Employers must be sure to take prompt and immediate disciplinary action when necessary and the investigation has revealed that bullying has occurred. Further, employers should ensure that the discipline imposed is proportionate to the offense committed. Employers should not hesitate to take action, investigate and, if needed, impose discipline even if the bully is a high level employee or supervisor.

**Step 7: Be Proactive to Prevent Bullying Before It Starts**

It is important for employers to be proactive and take all necessary steps to eliminate workplace bullying before it begins. This includes identifying potential bullies during the hiring process by having potential candidates interviewed by more than one person to gain various perspectives, conducting thorough background checks and gaining valuable information from employee references. Employers may want to consider providing counseling and employee assistance to employees with known issues that could result in abusive behavior such as alcoholism, gambling or addiction. Further, employers should make sure to identify equal opportunity offenders and work to curb their abusive and harassing behavior. Additionally, employers should promote a safe and healthy workplace in which bullying will not be tolerated and implement a violence prevention program for all employees.
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