

# Bullying in the Workplace

## Legislation Seeks to Protect Workers from Abuse, Harassment

By KATHRYN S. CROUSS, Esq.

A public hearing was held on June 25 before the Joint Committee on Labor and Workforce Development regarding HB 1766, proposed legislation titled “An Act Addressing Workplace Bullying, Mobbing, and Harassment, Without Regard to Protected Class Status.” Dubbed the ‘Healthy Workplace Bill,’ the bill seeks to provide protections for workers against workplace abuse and harassment.

Under the current state of the law in Massachusetts, workers who are members of a protected class have legal recourse for harassment and abuse suffered in the workplace. Existing statutes in Massachusetts establish remedies for employees who are subjected to a hostile work environment in the context of sexual harassment, or if the hostile behavior is motivated by race, color, sex, sexual orientation, national origin, or age.

However, Massachusetts does not presently offer general legal protection to employees against hostile treatment in the workplace otherwise. In an ‘at-will’ employment state such as Massachusetts, employers and employees are free to enter into or exit from a working relationship at any time, absent an express employment agreement. Under the at-will employment rule, continued employment is at the discretion of the employer, and employers are not prohibited from making arbitrary employment decisions, even decisions that may appear dishonest, distasteful, or rude.

Exceptions to the employment-at-will doctrine are narrow and limited. The law defers to the decisions of employers and intervenes on an employee’s behalf only for exceptionally strong public-policy reasons. Examples of such public policies are when an adverse employment decision is motivated by an employee serving on a jury, filing a workers’ compensation claim, or reporting criminal activity at work, whether the report is made internally or to public authorities.

According to the bill’s co-sponsors, Rep. Ellen Story of Amherst and Sen. Katherine Clark of Melrose, the Healthy Workplace Bill seeks to provide legal remedies for employees who have been harmed psychologically, physically, or economically by deliberate exposure to abusive work environments. The bill indicates that “at least a third of all employees will directly experience health-

endangering workplace bullying, abuse, and harassment during their working lives, and this form of mistreatment is approximately four times more prevalent than sexual harassment alone.”

Additionally, the bill’s co-sponsors indicate that it incentivizes employers to prevent and respond to abusive mistreatment of employees by allowing employers to minimize liability. The bill states that “abusive work environments can have serious conse-

however. Many believe workplace bullying is better addressed internally, such as by an employer’s human-resources department, as opposed to within the court system. Regulating workplace bullying, they say, might serve only to create a venue for disgruntled employees, opening the doors to frivolous lawsuits filed by employees in response to legitimate negative performance reviews. Such legislation could inhibit employers from making even constructive



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quences for employers, including reduced employee productivity and morale, higher turnover and absenteeism rates, and increases in medical and workers’ compensation claims.”

Finally, the co-sponsors say the bill includes provisions that discourage weak or frivolous claims. The bill establishes affirmative defenses for employers when:

- The complaint is based on an adverse employment action reasonably made for poor performance or economic necessity;
- The complaint is based on a reasonable performance evaluation; or
- The complaint is based on an employer’s reasonable investigation about potentially illegal or unethical activity.

Clark recently indicated that “it is important to understand that this bill is not about everyday disagreements in the office, or someone having a bad day, or a boss providing directives, oversight, and feedback. Instead, it seeks to address a regular pattern of health-harming mistreatment at a work environment in the form of verbal abuse, offensive and threatening behavior, or malicious work interference.”

The bill is not without its detractors,

criticism of an employee’s performance for fear of a retaliatory lawsuit. Some fear the proposed legislation would allow an employee to avoid accountability.

Although this is the bill’s third submission, having been first introduced during the 2009-10 legislative session without success, there are indications that workplace anti-bullying legislation is gaining momentum. Since 2003, variations of the Healthy Workplace Bill have been introduced in 25 states, and 12 states (in addition to Massachusetts) are currently pushing for such legislation, according to David Yamada, a professor of labor and employment law at Suffolk University Law School, and one of the bill’s proponents.

It is too soon to determine the potential outcome regarding the bill. However, employers are advised to take caution. Language in the proposed bill indicates that an employer will be vicariously liable for violations of the statute committed by its employee. In other words, employers may be legally responsible for the actions of their supervising employees, if such employees are found to have engaged in abusive conduct or to have created an abusive work environment as defined by the statute.

Employers can defend against a lawsuit only if “the employer has exercised reasonable care to prevent and correct promptly any actionable behavior, and the complainant employee unreasonably failed to take advantage of appropriate preventive or corrective opportunities provided by the employer.”

Employers are advised to be vigilant about

ensuring that managers treat employees with respect and dignity. Further, employers should ensure that they include anti-bullying language in their code of conduct policies, in order to preserve the availability of the affirmative defense. Employers are advised to contact an employment-law attorney about creating policies that will comply with the

proposed legislation. ■

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