The equal-opportunity bully

The problem of workplace bullying often has no immediate remedy

By Katie Debski, Kathryn Bain and Laura Mazza

The voice at the other end of the line is tremulous, distraught. "I think I have a claim for…. hostile work environment? Maybe wrongful termination?" The potential client, Joe, starts at the beginning, describing his 10-year career with a nonprofit organization. He was passionate about the nonprofit's cause and devoted himself to his job, working long hours including nights and weekends. He was promoted several times, well-liked by coworkers and the community he served. Then six months ago, everything changed.

His manager retired and was replaced by a new hire from outside the agency. The new manager was Cruella Davis, who Joe had known in graduate school and who happened to be an old friend of the Executive Director. Joe opposed Cruella's hiring based on her grating personality, but once the E.D. made the decision to hire, Joe quietly resigned himself to the new management style.

Cruella seemed less than enthusiastic to work with Joe. Two weeks after she joined the organization, Cruella called Joe into her office and gave him a written warning about attendance, advising him to be at his desk no later than 9:00 a.m. each morning (though he typically worked a 9:30 a.m. to 6:00 p.m. schedule and often worked from home on evenings and weekends). She asked other employees to monitor Joe for compliance.

A month later, Joe had his first formal performance review under Cruella. She ranked him as "Needs Improvement," criticizing Joe's work ethic and interactions with certain community leaders with whom he had a long-standing positive relationship. In the review meeting, she referred to him as "moronic" and said he was one of the worst employees she had ever had the "unfortunate job of supervising."

Joe, unsurprisingly, felt attacked and insulted, so he went to the E.D. for guidance. The E.D. refused to take sides, urging Joe to speak with Cruella and "work things out."

Joe tried to meet with Cruella, but she repeatedly cancelled at the last minute, and in one instance even sent him an email saying she had "better things to do than listen to your pathetic whining." When she finally met with Joe, she raised her voice and berated him, telling him that he needed to "stop being an idiot," that he "wasn't going to win a popularity contest," and that it was "only a matter of time until he would be out of here." Cruella began excluding Joe from key meetings with other teams which specifically impacted his projects, and he overheard her joking about him on multiple occasions with his co-workers. She gave him an assignment with a deadline that was impossible to meet, and when he was predictably unable to complete it, she called him a "failure" in front of two of his co-workers, and asked "how did someone like you ever get this job in the first place?" Then, at an organization-wide meeting, Cruella publicly criticized Joe and his handling of a recent public relations issue. She asked other employees to take an anonymous survey regarding "better ways to handle that situation." After the meeting, several co-workers told Joe privately that they disagreed with Cruella's comments, that she was being a "jerk" to him and singling him out, but they all agreed there was nothing he could do since Cruella and the E.D. were friends.

Joe was deeply upset and humiliated and started having trouble sleeping. He went to see a physician for anxiety and depression, and was prescribed medication. He didn't tell anyone at the organization about his symptoms because he feared Cruella might retaliate against him. Last week, Cruella called Joe into her office and told him that he "was no longer a good fit" and was being terminated. He was being replaced by a junior employee who Joe had trained two years ago. Joe was devastated.

Bullying is a frequent complaint

We get calls from employees like "Joe" almost every day, oftentimes with even more severe examples of bullying behavior, including name-calling, verbal abuse, and the frequent use of screaming or yelling. Joe was unfairly treated and badly damaged. He watched a successful decade-long-career go down the drain – all because of a workplace bully.

We talk to Joe and learn that he is a white heterosexual male, in his late 30s, born in the United States. He doesn't fall into any protected category under the law (e.g., race, color, sex, sexual orientation, national origin, age, etc.). The company was never put on notice of his recent mental health issues. He didn't take a medical leave and never filed a worker's compensation claim. He's not a whistleblower, nor has he engaged in any other protected activity for which the company could arguably have retaliated against him.

Equal-opportunity harassment

Joe is not the victim of sexual harassment or physical assault – just plain old "equal opportunity harassment." He is shocked when we tell him there is no legal recourse. We explain the concept

of at-will employment, which can be a bitter pill to swallow under these circumstances. Cruella's treatment of Joe may have been abusive, grossly unfair, unmerited, and traumatic, but it was not illegal.

Why aren't there legal protections for victims of workplace bullying? That is a question that has been increasingly examined in the United States since at least 2000, when Suffolk University law professor David Yamada wrote a seminal law review article on the topic in which he examined various potential common law and statutory remedies that might apply and concluded that existing law failed to play an adequate compensatory and preventive role in severe bullying situations.[1]

Yamada covers a growing body of research showing the negative health effects (and business impact) of workplace bullying. He has updated the research over time and, as of today, it is estimated that up to 37 percent of Americans have been victims of workplace bullying at some point during their careers. The health ramifications are severe, including psychological effects like depression, stress, loss of sleep (and resulting fatigue), mood swings, feelings of shame, guilt, embarrassment and low self-esteem, even Post-Traumatic-Stress-Disorder, with physical effects ranging from stress headaches, high blood pressure, reduced immunity to infection, and digestive problems. There are also bottom-line ramifications for employers that tolerate abusive work environments, including tangible costs (e.g., increase in medical and workers' compensation claims and costs of defending lawsuits), and less tangible ones (e.g., opportunity costs). Soon after Yamada published his article, he authored a model "Healthy Workplace Bill" (HWB) that was designed to combat the problem, but as yet, has failed to be adopted by any state in its entirety.

Despite lackluster legislative support for the full HWB, Yamada's work along with others such as Dr. Ruth Namie and Dr. Gary Namie (psychologists who founded the Workplace Bullying Institute [WBI] in the late 1990's) have spurred a campaign in the U.S. against workplace bullying and a movement to get the HWB passed into law all around the nation. The history and status of this movement is summarized on the WBI's Website (www.workplacebullying.org) and also the site for the HWB itself, including text of the model bill (www.healthyworkplacebill.org). The problem of workplace bullying has been featured prominently in the national press, including National Public Radio, the New York Times, the Wall Street Journal, and Time Magazine. Some commentators have noted the irony that bullying is widely prohibited throughout our schools, but that adult workers have absolutely no protection.

Legislation can't get legs

The anti-workplace-bullying initiative has enjoyed bipartisan support, but to date, only limited success in getting any relevant legislation – much less the full HWB – passed. In 2003, California made the nation's first attempt at anti-bullying legislation (AB 1582), but the bill died in committee with no hearing date scheduled. In 2014, there was a second attempt in California by Assemblywoman Lorena Gonzalez (D-San Diego) who authored AB2053. During the legislative hearings on the bill, Gonzalez and other proponents explained that abusive work environments are unfortunately a growing epidemic in the United States. The bill had bipartisan support and the legislative findings were that workplace bullying could "reduce productivity and morale, which may lead to higher absenteeism rates, frequent turnover, and even increases in workers' compensation claims," estimating the financial cost of workplace abuse to be as much as $200 billion annually.[2]

AB2053 was ultimately signed into law on September 9, 2014, by Governor Jerry Brown and went into effect on January 1, 2015. The new provision omits much of the model HWB, and it doesn't apply to smaller entities with fewer than 50 employees. Instead, it simply amends California Government Code section 12950.1 (part of the Fair Employment and Housing Act, "FEHA"), to expand existing training and education requirements for supervisory employees. Previously, for employers with 50 or more employees, the section required two hours of mandatory sexual harassment training, but the new law includes the prevention of "abusive conduct" as a component of this program.

The act defines "abusive conduct" 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. 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." The provision further specifies that "[a] single act shall not constitute abusive conduct, unless especially severe or egregious."

Twenty-eight other states have introduced some version of the HWB, but only three states currently have some portion of it, or a related bill, signed into law (Tennessee, California and Utah)[3]. In California, the bill's proponents explained that they wanted to take a "measured approach to the problem" and thus, drafted the law with the purpose of preventing bullying by educating managers "rather than being punitive." They also coupled it with sexual harassment training, finding that "it is not uncommon for the two problems to occur hand in hand."[4]

Where are the teeth?

In fact, Cal. Government Code section 12950.1(d) specifically states that a failure to provide the training will *not give rise to a cause of action* for sexual harassment (nor "abusive treatment" for that matter): "[A] claim that the training and education required by this section did not reach a particular individual or individuals shall not in and of itself result in the

liability of any employer to any present or former employee or applicant in any action alleging sexual harassment. Conversely, an employer's compliance with this section does not insulate the employer from liability for sexual harassment of any current or former employee or applicant."

Although the statute is clear that a failure to train cannot be offered as the sole proof of harassment or discrimination, that does not eliminate a lack of training as a factor to be considered in those cases. For example, in a recent unpublished case, *Alejandro Madera Chavez v. Southern California Edison Company*, 2015 Cal.App.Unpub. LEXIS 760, the plaintiff appealed after trial, claiming that the employer's failure to train on sexual harassment under section 12950.1 should have been considered in determining whether it was liable on his failure to prevent a sexual harassment claim under section 12940(k). While the appellate court considered this argument, it ultimately found that there was insufficient evidence presented at trial to establish the training had not in fact occurred. The court then reiterated that even if plaintiff had established a lack of training, he still needed to show "more" than a lack of compliance with section12950.1 in order to prevail.

The only enforcement mechanism found within the new provision lies with the government, and not with the private litigant, per section12950.1(e), and does not carry any apparent financial consequence: "If an employer violates this section, the [Department of Fair Employment and Housing] may seek an order requiring the employer to comply with these requirements." Even though part (f) states that the training component is only intended to "establish a minimum threshold and should not discourage or relieve any employer from providing for longer, more frequent, or more elaborate training and education regarding workplace harassment or other forms of unlawful discrimination in order to meet its obligations to take all reasonable steps necessary to prevent and correct harassment and discrimination," one might inquire: Where are the teeth?

Interestingly, according to research by proponents of the HWB on its Website, the United States is one of the only Western democracies lacking an anti-workplace bullying statute in place at the national or federal level. The term "workplace bullying" was popularized in the United Kingdom in the 1980's and early 1990's in a series of BBC radio broadcasts addressing the topic.[5] Why is the U.S. different in this respect? Is it our concept of federalism? Are we worried about the socioeconomic implications of banning workplace bullies? The financial impact on companies by creating a mandate to employers? Are we concerned with issues of proof, or worried about somehow chilling employers' disciplinary processes?

For now, there is still little recourse for someone like our imaginary client, Joe. Joe's situation bears many of the hallmarks of a classic bullying situation. He was competent and well-liked, making him a threat to the bully. The bully thus isolated him, fabricated evidence against him, and deliberately embarrassed him in front of colleagues. Joe received little help from his employer and was told it was simply a "personality conflict" that he should try to work out on his own. His coworkers supported him privately, but no one stood up for him when it counted, and no one could prevent his ultimate termination.

If a case of workplace bullying were particularly egregious, (especially if the employer failed to heed the new training mandate), an aggrieved employee could try to bring a claim of intentional infliction of emotional distress (IIED). Yamada's research, however, has shown that typical workplace bullying (akin to Joe's), with no sexual harassment or protected-class discrimination element, rarely leads to IIED liability.[6] When courts have rejected workplace bullying related IIED claims, the most frequent reason was that the complained of behavior was not sufficiently extreme and outrageous to meet the elements of the tort, that plaintiffs could rarely show the requisite level of severe emotional distress, or else the plaintiff's claims were precluded by a workers' compensation statute.[7]

Other legal approaches that Yamada examined and found largely ineffective were claims for intentional interference with the employment relationship (arguing that the interfering "third party" is a co-worker or supervisor acting outside the scope of the employment relationship), and discrimination claims for hostile work environment based on a protected class (including mental disability created by the bullying).[8] According to Yamada, the disability discrimination claims tend to fail because abuse and stress are often seen as intrinsic to employment (not unlike the way sexual harassment was perceived a generation ago; just watch any episode of "Mad Men" for examples). Unfortunately, a disability discrimination theory would not work for someone like Joe, since the employer never had knowledge of his disability. Even in cases where the person is in a protected class, it is often difficult to prove a causal link between the protected class and the abusive behavior, as it more typically appears like a bullying situation rather than actionable harassment targeting the person because of their protected status.

One theory that has yet to be explored in California is whether a bullied and then terminated employee like Joe could bring a claim for wrongful termination in violation of public policy (assuming the organization had 50+ employees and the employer had failed to implement the section12950.1 training requirement), since the new statute evinces a strong public policy against bullying.

The bipartisan support and passage of AB2053 shows that California may be open to a healthier, bully-free workplace in the years to come, but for now, it is only prepared to support prevention efforts and not any type of enforcement mechanism. The effect of the new training

provision may be measured over time to see whether training is an effective way to help prevent the problem of workplace bullying. In the meantime, plaintiffs' attorneys will be testing the waters to see whether the new law can be used to establish new legal precedent to give victims more viable causes of action against workplace bullies and garner support for stronger legislation. As practitioners fielding calls from people like Joe every day, we certainly hope so.

Katie Debski, Kathryn Bain and Laura Mazza

Katie Debski is a Plaintiff's side employment attorney at the firm of Bain Mazza & Debski LLP. *She authored this article with the assistance of her two partners, Kathryn Bain and Laura Mazza. Their firm handles a broad range of employment law matters, including employment discrimination, harassment, retaliation, wrongful termination, and wage and hour violations. Their practice also includes personal injury, representing plaintiffs in automobile and slip and fall accidents. All three partners are mothers of young children and firmly believe that litigation and parenthood do not have to be mutually exclusive. A collaborative approach, in which all attorneys work on every case together, sets their firm apart. Check them out on Yelp and at www.bmdlegal.com.*

Endnotes

[1] David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 Geo.L.J. 475 (2000).
[2] Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assembly Bill No. 2053 (2013-2014 Reg. Sess.), July 31. 2014, pg. 3
[3] http://www.healthyworkplacebill.org/states.php
[4] Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assembly Bill No. 2053, supra.
[5] According to Yamada's research posted on his Website, Great Britain passed the Protection from Harassment Act 1997, with its final provisions enacted in August 2001, containing broader anti-harassment provisions than the U.S. which encompass the problem of bullying. Scandinavian nations were some of the first to enact explicit anti-bullying laws as early as 1994. Many other European nations (particularly EU nations) also have robust employee protections which legally compel employers to prevent or correct bullying. Since 2005, Ireland has had a health and safety code that has strong provisions to address bullying. Canada has enacted several provincial laws that target bullying starting in 2004. Australia has actually criminalized workplace bullying starting in 2011.
[6] David C. Yamada, *Workplace Bullying and American Employment Law: A Ten-Year Progress Report and Assessment*, 32 Comp. Labor Law & Pol'y Journal 251, 257 (2010).
[7] Ibid.
[8] Id. at 258-259.