

*“Sticks and stones may break my bones but words will never hurt me!”*

We have all heard and maybe even uttered this phrase. It is a response that many of us consign to playgrounds and school hallways; assuming that, with maturity, bullying and other hostile behaviors become a relic of our past. Not something to be contended with in the workplace.<sup>1</sup> Ideally, the work environment should be a place where coworkers collaborate, working together toward the common goal of company-wide success. At the very least, we expect co-workers to act “like adults” and treat one another with respect. Unfortunately, this is not always the case. **According to a recent survey, an astounding 27% of those surveyed claimed they had been bullied at work; 72% of the respondents said they were aware of bullying incidents in the workplace. Employers recognize it too; 51% have reported incidents of workplace bullying.**<sup>2</sup>



These statistics are rather surprising given the number of laws in place to protect worker’s rights and to ensure a safe and equitable workplace. The fact is that while there are state and federal laws prohibiting discrimination and hostile work environments based on protected categories (race, gender, age disability, etc.), the law does not yet mandate general civility in the workplace. This may be changing, however, as more and more states consider whether abusive conduct in the workplace should be deemed illegal.

### ➤ WHAT IS “WORKPLACE BULLYING”?

**Workplace bullying is abusive conduct that takes place in the work environment and may include, but is not limited to:**

- Repeated verbal abuse, such as derogatory remarks, insults and epithets
- Any conduct (physical or verbal) that a reasonable person would find threatening, intimidating, or humiliating
- Acts that sabotage or undermine an employee’s work performance.

*Abusive conduct can have very real and significant effects on targeted employees.* Often the behavior is subtle and goes unnoticed, thereby resulting in a slow process of psychological and emotional manipulation.<sup>3</sup> Some of the psychological effects can include stress, depression, embarrassment, panic attacks, sleeping disorders, Post Traumatic Stress Disorder (PTSD), and low self-esteem. Other symptoms manifest physically.

**Abusive conduct in the workplace also negatively impacts employers in a number of ways.** For example, it can lead to decreased productivity, increased absenteeism, escalation in errors and accidents due to fatigue, increased turnover, higher risk of litigation, and damage to the company's reputation.

## ➤ WHAT DOES A BULLY LOOK LIKE? WHAT ABOUT THE VICTIM?

**Some may think that abusive conduct is easily identified and that the bully in the workplace resembles the playground bully who was the biggest, toughest kid. But not so.** Very often, the workplace bully is masked by a charming, charismatic demeanor. Bullies are often skilled at reading people and use that skill to their advantage to exploit the weaknesses or quirks of co-workers and/or direct reports.<sup>4</sup>

While a bully can be either gender and any race or nationality, a survey conducted by the Workplace Bullying Institute does reveal some trends. **Men are the aggressors 69% of the time, but women can still be bullies. And when they are, women choose female targets 68% of the time. Even when men are the perpetrators, women are the primary target (57% of cases). Overall, women are the subject of bullying in 60% of cases.**<sup>5</sup> **Bosses engage in abusive conduct in 56% of the cases.**<sup>6</sup>

**Despite these statistics, anyone can be a target.** The victim of abusive conduct in the workplace is not a stereotypical, mousy character. In fact, it can even be a burly, tough NFL offensive lineman. Recall the national scandal involving Jonathan Martin and Richie Incognito of the Miami Dolphins. Incognito and three other players engaged in a bullying campaign that started in 2012 during Martin's rookie year. Incognito and his sidekicks threatened Martin with violence, discussed sexually assaulting his sister, and subjected Martin to racial slurs on a daily basis. Eventually, Martin took a voluntary leave of absence from the team for "emotional" reasons mid-season in 2013. Incognito was suspended during that season and the next for "conduct detrimental to the team." After a being traded and suffering an injury, Martin decided to retire — at only 25 years old. Incognito was eventually reinstated by the League and signed with the Buffalo Bills as a starter.<sup>7</sup> The NFL's outside counsel's report sums it up best:

*As all must surely recognize, the NFL is not an ordinary workplace. Professional football is a rough, contact sport played by men of exceptional size, speed, strength and athleticism...But even the largest, strongest and fleetest person may be driven to despair by bullying, taunting and constant insults.*<sup>8</sup>

## ➤ GRASSROOTS MOVEMENT TO ADDRESS BULLYING IN THE WORKPLACE

Before 2001, the idea that employees could be bullied by coworkers and supervisors was scarcely, if ever, discussed. But in 2002, a lobbying effort to pass a Healthy Workplace Bill in California jumpstarted a national movement seeking to pass this type of legislation. Today, local residents across the United States organize and meet with their state representatives to educate them about abusive conduct in the workplace. They advocate for the passage of legislation to address what proponents see as a real threat to workplace safety and a national epidemic.<sup>9</sup>



No state has yet to enact a “**Healthy Workplace**” bill— which would make abusive conduct in the workplace unlawful and allow employees to file suits and seek damages if they were the victim of workplace bullying. However, since 2003, 30 states and two territories have introduced legislation addressing this issue. **Currently, Healthy Workplace bills are pending in 9 states: Massachusetts, Minnesota, New York, Pennsylvania, Rhode Island, Utah, Vermont, West Virginia, and Wisconsin.**<sup>10</sup>

**Although no state has adopted a comprehensive Healthy Workplace bill, three states have taken concrete steps in this direction.** Tennessee encourages all state employers to implement anti-bullying policies by providing protection to employers from emotional damages claims when such policies are in place. California and Utah have enacted mandatory abusive conduct training. More specifically, California requires employers to include “abusive conduct” training as part of their mandatory sexual harassment training, and Utah requires training for state employees. None of this legislation goes so far as to explicitly outlaw bullying or establish a cause of action for abusive conduct in the workplace.

Support has been weaker on the federal front. Though Congress considered healthy workplace legislation in 2010, it has taken no formal action since that time.<sup>11</sup> Interestingly, the Occupational Safety & Health Administration (“OSHA”) enacted an anti-bullying policy covering its own employees in 2011, but there is no specific standard extending these provisions to other employers.

## ➤ HOW ARE OTHER COUNTRIES HANDLING WORKPLACE BULLYING?

Abusive conduct in the workplace is not a U.S. phenomenon. It occurs worldwide, but many countries outside of the U.S. have been addressing the issue through legislative efforts for years. The following countries have already enacted anti-bullying legislation:<sup>12</sup>

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| <ul style="list-style-type: none"><li>• Sweden (1994)</li><li>• England (1997)</li><li>• France (2001)</li><li>• Australia (2005)</li><li>• Ireland (2008)</li></ul> | <ul style="list-style-type: none"><li>• Canada<ul style="list-style-type: none"><li>- Federal workers (2008)</li><li>- Quebec (2004)</li><li>- Saskatchewan (2007)</li><li>- Ontario (2010)</li><li>- Manitoba (2011)</li></ul></li></ul> |
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## ➤ IF IT'S NOT ILLEGAL, WHY SHOULD U.S. EMPLOYERS CARE?

While a 2013 survey showed that 68% of executives considered “workplace bullying a serious problem,”<sup>13</sup> less than 20% of U.S. employers take action to stop the behavior even when informed of abusive conduct.<sup>14</sup> Proponents of healthy workplace bills argue that there is a moral obligation to address abusive conduct.

The fundamental question employers should ask themselves when evaluating how to address workplace bullying is:

***What kind of workplace do we want to foster?***



Since no one wants to work where abusive conduct is condoned, we believe that addressing abusive conduct is good for the bottom line. Here are some of the likely positive effects:

- Increased productivity
- A more collaborative and creative work environment
- Better recruiting results
- Better retention rates
- Curtailed negative publicity
- Reduced medical insurance costs, fewer workers' compensation claims, and less time away from work
- Reduced litigation potential<sup>15</sup>
- Happier and more engaged employees

## ➤ WHAT CAN EMPLOYERS DO?

To prevent, or at least minimize, abusive conduct in the workplace, employers must strive to create and maintain a dignified workplace that has a strong culture of respect. Leading by example is critical. We urge employers to consider taking some or all of the following steps to create and support a healthy work atmosphere:

- **Implement an Abusive Conduct Policy**
- Similar to policies prohibiting harassment and discrimination based on protected classes, employers should consider an abusive conduct policy. It can even be incorporated into existing policies.
- Revise corporate Code of Conduct language to denounce abusive conduct and to hold perpetrators accountable.
- Avoid language that is too general to avoid running afoul of the National Labor Relations Act.
- **Establish and Publish a Detailed Complaint and Investigation Procedure**
- As with discrimination and harassment complaints, provide a variety of ways for employees to complain so that they can feel comfortable expressing their concerns.
- If a complaint is raised or bullying is witnessed (or the company learns of it in another way), make sure to address the situation promptly and take every situation seriously.
- **Train your Workforce**
- Train employees about: respecting coworkers, the dangers of bullying, and the negative impact such behavior has not only on the victim but co-workers and the company as a whole.
- While all employees can benefit from abusive conduct training, specific training tailored to supervisory personnel is essential to help these key employees know not only how to spot such conduct but also how to address it when it occurs.

➤ The atmosphere of fear and mistrust created by abusive conduct can undermine the success of any business. Companies that denounce abusive conduct as part of their core values — just as they refuse to tolerate harassment and discrimination — are sure to reap the rewards.

<sup>1</sup> Workplace Bullying Institute, 2014 WBI Workplace Bullying Survey 2014 — Informative 2014 Results Flyer A. <http://workplacebullying.org/multi/pdf/2014-Survey-Flyer-A.pdf>.

<sup>2</sup> SHRM Survey Findings: Workplace Bullying, Society for Human Resources Management (Feb. 28, 2012). <https://www.shrm.org/research/surveyfindings/articles/pages/workplacebullying.aspx>.

<sup>3</sup> Employer Resource Council: 20 Subtle Signs of Workplace Bullying, Workplace Bullying Institute (Nov. 10, 2013). <http://www.workplacebullying.org/erc/>.

<sup>4</sup> Employer Resource Council: 20 Subtle Signs of Workplace Bullying, Workplace Bullying Institute (Nov. 10, 2013). <http://www.workplacebullying.org/erc/>.

<sup>5</sup> Workplace Bullying Institute, 2014 WBI Workplace Bullying Survey 2014. <http://workplacebullying.org/multi/pdf/WBI-2014-US-Survey.pdf>

<sup>6</sup> *Id.*

<sup>7</sup> Incognito, Others Tormented Martin, ESPN.com (Feb. 15, 2014). [http://espn.go.com/nfl/story/\\_/id/10455447/miami-dolphins-bullying-report-released-richie-incognito-others-responsible-harassment](http://espn.go.com/nfl/story/_/id/10455447/miami-dolphins-bullying-report-released-richie-incognito-others-responsible-harassment).

James Brady, Jonathan Martin, Victim of Bullying Scandal, Reportedly Retiring from NFL, SBNation (Jul. 27, 2015). <http://www.sbnation.com/nfl/2015/7/27/9049659/jonathan-martin-retirement-49ers-dolphins-bullying>. Zach Brazier, Richie Incognito Returns While Bullying Victim Retires, N.Y. Post (Aug. 3, 2015). <http://nypost.com/2015/08/03/nfl-bullys-redemption-comes-as-victim-quietly-exits/>.

<sup>8</sup> Theodore V. Wells, Jr., Brad S. Karp, Bruce Birenboim, David W. Brown, Report to the National Football League Concerning Issues of Workplace Conduct At the Miami Dolphins, 140, Paul, Weiss, Rifkind, Wharton & Garrison LLP (Feb. 14, 2014) (emphasis added). <http://63bba9dfdf9675bf3f10-68be460ce43dd2a60dd64ca5eca4ae1d.r37.cf1.rackcdn.com/PaulWeissReport.pdf>.

<sup>9</sup> Workplace Bullying Institute, 2014 WBI Workplace Bullying Survey 2014 — Informative 2014 Results Flyer A, *supra*.

<sup>10</sup> Healthy Workplace Bill, State of the Union, <http://healthyworkplacebill.org/states/>.

<sup>11</sup> Healthy Workplace Bill, History of the U.S. Legislative Campaign. <http://www.healthyworkplacebill.org/about.php>.

<sup>12</sup> In some locations, it is addressed in discrimination laws; in others, criminal codes or workplace safety and health schemes address the behavior. See Healthy Workplace Bill, The International Legislative Movement, <http://www.healthyworkplacebill.org/international.php>.

<sup>13</sup> Workplace Bullying Institute, 2014 WBI Workplace Bullying Survey 2014, *supra*.

<sup>14</sup> *Id.*

<sup>15</sup> Abusive conduct can quickly escalate and employers could be subject to claims of assault, battery, defamation, harassment, intentional infliction of emotional distress, negligent hiring, retention and/or supervision, intentional interference with an employment contract, etc.

<sup>16</sup> Policies demanding civility in the workplace may be deemed too broad and, therefore, unlawful interference with employee rights to discuss workplace concerns, See T-Mobile USA, Inc. and Communications Workers of America and Communications Workers of America Local 7011, AFL-CIO, Cases 02-CA- 115949, 10-CA-128492, 14-CA-106906, 28-CA- 106758, 28-CA-117479, 28-CA-128653, and 28-CA-129125, \_\_\_ NLRB No. \_\_\_ (April 29, 2016); Laurus Technical Institute, 360 NLRB No. 133 (2014); First Transit, Inc., 360 NLRB No. 72 (2014); Hills & Dales General Hospital, 360 NLRB No. 70 (2014); Fresenius USA Manufacturing Inc., 358 NLRB No. 138 (2012).