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*Employee Rights*

## Employment Attorneys Urged to Be Creative When Pursuing Workplace Bullying Litigation

MIAMI—A panel of speakers acknowledged the developing legislative response to workplace bullying March 21 at an American Bar Association conference and encouraged employment attorneys to keep thinking outside the box when filing claims of co-worker or manager bullying.

Speaking at the midwinter meeting of the Section of Labor and Employment Law's Employment Rights and Responsibilities Committee, Gary B. Eidelman of Saul Ewing in Baltimore echoed three other panelists in emphasizing that no state currently has enacted an anti-bullying statute.

However, as Chicago attorney Kristin M. Case pointed out, lobbying efforts at the state level are presently underway, resulting in a handful of healthy workplace bills being put before state legislatures. Amid the flurry of legislative attempts, Case encouraged plaintiff-side counsel to think creatively when exploring the changing legal landscape.

**Amid the flurry of legislative attempts to prohibit workplace bullying, plaintiffs' attorney Kristin Case encouraged plaintiff-side counsel to think creatively when exploring the changing legal landscape.**

Regarding union-represented employees, Brian J. LaClair of Blitman & King in Syracuse, N.Y., suggested first looking at the collective bargaining agreement. He observed that ''no discrimination'' clauses and ''health and safety'' provisions prove most helpful in framing the often undefined term ''bullying.''

Jo Linda Johnson of the Equal Employment Opportunity Commission in Washington, D.C., explained that bringing successful workplace bullying lawsuits under the guise of Title VII of the 1964 Civil Rights Act violations has been an ''evolution'' in both the public and private sectors.

Employer-side attorney Eidelman moderated the panel. He opined that in most jurisdictions, bringing bullying causes of action under the tort of intentional infliction of emotional distress is ''virtually dead.'' The tide is shifting away from this theory as the American public becomes increasingly desensitized in the wake of Newtown and other school shootings, he said.

Case disagreed, saying that intentional infliction of emotional distress is still a useful method of bringing bullying actions to court, if pleaded correctly.

**No Bright Line Established.** Eidelman said many issues involved with workplace bullying are still in their infancy. He added that identifying and tackling these issues will be largely a state law responsibility at first.

Eidelman said one main issue is figuring out where to draw the line between an effective supervisor and a genuine bully.

Case recommended looking at the physical health effects on the bullied employee. She also suggested looking not only at the bully's past, but also at the background of the client.

Instances of repeated screaming or the throwing of office items are good ways to show workplace bullying, Case said. She added that a claim of intentional interference with employment could be used to show the physical aspects of bullying.

Many times, attorneys argue assault in the absence of official anti-bullying legislation, Case said. She noted in her meeting paper that in *Raess v. Doescher*, Ind., No. 49S02-0710-CV-424, 4/8/08, a supervisor became angry and red-faced, balled up his fists, stepped close to the employee, and yelled. The court admitted otherwise hearsay evidence of the supervisor's past similar actions under the victim's state of mind exception, Case said.

Case estimated that in her experience, about 75 percent of bullies are male with primarily female victims. The gender breakdown could reflect the fact that bullies, at school and in the workplace, tend to pursue people they perceive as weaker, and frequently see women as being physically weaker, she said.

Johnson said this gender disparity usually sparks an ''interest for the commission to get involved.''

**How-To Primer for Plaintiffs' Side Attorneys.** Case reiterated that employment attorneys, in the absence of state anti-bullying legislation, must continue to analyze workplace bullying according to the elements of various torts. Since 2003, 23 states have introduced a type of healthy workplace bill, and eight states currently have active bills, Case wrote in her meeting paper.

Commenting on the several healthy workplace bills on the horizon, Case said New York's proposal is likely to pass this year. The legislation is ''not nearly as scary as management attorneys think,'' she said, because the

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drafters have gone out of their way to limit unmeritorious lawsuits by requiring plaintiffs to furnish medical proof of physical or psychological harm.

In the meantime, Case emphasized the importance of intentional infliction of emotional distress claims, adding that they are often pleaded incorrectly. She said IIED claims commonly arise from unequal power, such as between a manager and an employee. IIED claims also can cover situations in which the bullied employee lacks the opportunity to leave and seek another job, especially in today's difficult economy, Case asserted.

She also suggested that negligent hiring, retention, and supervision claims can be used to address workplace bullying in court.

Successful negligence claimants, Case said, can show they informed the employer of bullying actions, and can prove through the bully's background that these actions happened previously or that the bully has a criminal record.

Defamation claims can also assist with litigating workplace bullying, Case advised. The key is to focus on what the bully is saying and to whom, she said. Many times, Case explained, courts have found that the element of ''publication'' in defamation cases is shown through disclosure to even a small group of people.

For example, she said, in *Gibson v. Philip Morris Inc.*, Ill. Ct. App., No. 5-96-0521, 9/24/97, a jury returned a seven-figure defamation verdict for an employee based on three co-workers making defamatory statements to the victim's manager, who subsequently fired him.

**Glimpse of Alternatives in Unionized Setting.** On a practical level, LaClair advised attorneys to first examine the facts, and then look to the collective bargaining agreement for any provisions under which to bring workplace bullying grievances against employers.

LaClair said mutual respect/employee rights clauses mentioning ''dignity'' are usually the best bet. He also pointed to ''no discrimination'' clauses and health/safety provisions, which are becoming more broadly worded in particular industries.

Adding an anti-bullying provision to a collective bargaining agreement, LaClair said, is a double-edged sword. Although such a clause would provide protection, he said, those involved are wary of creating additional rights to discipline or discharge employees.

LaClair said bullying conduct in the union-represented workplace also can be tackled through a claim against the union for breach of the duty of fair representation. The fair representation duty extends to all members of the bargaining unit, whether union members or not, he said.

The fair representation rubric does not account for conflicts of interest, such as when two union-represented employees are on opposite sides in a workplace bullying dispute, LaClair observed. The best way to deal with such an ''awkward situation,'' he said, is to uphold the duty by gathering all the facts and by building a firewall, obtaining separate arbitrators, and assigning different business agents to represent the employees.

LaClair said there is no general rule if a bully is part of a bargaining unit, but a recent trend emphasizes the difficulty of defending ''just cause'' cases when a union-represented employee makes threats or is violent in the workplace. Many times, it depends on the industry and the workplace, he added.

''One person's violence is another person's horseplay,'' LaClair said.

When asked about the sometimes activist nature of the National Labor Relations Board, LaClair replied that he is not necessarily opposed to board involvement. But he stressed the need for a link between Section 7 of the National Labor Relations Act and the ''amorphous concept of bullying.''

Incidents of harassing employees crossing the picket line are also up-and-coming issues in analyzing workplace bullying, LaClair said, responding to an audience member's comment. But the issue is ''very fact specific,'' he said.

**EEOC's Evolutionary Process.** Johnson said EEOC's success in *Macy v. Holder* signified a progression, an evolution of framing workplace bullying in terms of Title VII violations not just in the courts overall, but in both the private and public sectors (*Macy v. Holder*, EEOC, DOC No. 0120120821, 4/20/12) (80 DLR A-4, 4/25/12).

In *Macy*, Johnson said, the commission found that the employee's discrimination charge based on gender identity, sex change, or transgender status is cognizable under Title VII, and may be processed under the federal sector administrative complaint framework established in EEOC regulations.

The *Macy* decision presented a unique posture and a novel method of analysis, and it underlined the importance of the issue of workplace bullying, Johnson said. She said the decision was the culmination of EEOC's efforts in that direction.

In the past, Johnson wrote in her PowerPoint presentation, courts often rejected Title VII claims by lesbian, gay, bisexual, and transgender employees. So the commission gleaned helpful language about sex stereotyping and same sex harassment from years' worth of cases in order to establish a reliable framework, she said.

Johnson pointed to two key cases that provided excellent argument sources: *Price Waterhouse v. Hopkins*, 490 U.S. 228, 49 FEP Cases 954 (1989), and *Oncale v. Sundown Offshore Oil Services*, 523 U.S. 75, 76 FEP Cases 221 (1998).

She said *Schroer v. Billington* also provided a great analogy to help the commission in bringing claims of workplace bullying under Title VII (577 F. Supp. 2d 293, 104 FEP Cases 628 (D.D.C.) (184 DLR AA-1, 9/23/08).

In *Schroer*, the court compared discriminating against people undergoing sex changes to discriminating against people converting from one religion to another. Using this comparison, EEOC expanded its arsenal of tackling workplace bullying with Title VII violations, Johnson said.

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