

Workplace Bullying and its Legal Implications for Unions

Brian J. LaClair¹

INTRODUCTION

Bullying in the workplace is not a new phenomenon. However, in recent years much attention has been paid to workplace bullying and the problems it poses for employees and employers alike. In the unionized workplace, there is, of course, another party involved: the union. This paper addresses some of the union's rights and responsibilities with regard to bullying in the workplace. It bears noting, at the outset, that "workplace bullying" is not a legal term of art, or even a well-defined concept.² Thus, this paper considers a range of workplace conduct that might reasonably be described as "bullying" under existing legal frameworks.

Part One recaps the union's quasi-statutory duty to fairly represent all members of the bargaining unit. This duty pervades much of what the union does, but arises most commonly in the context of the union's decision to pursue or not pursue a contractual grievance on behalf of an employee. Part Two addresses whether and to what extent collective bargaining agreements may govern workplace bullying. In the context of the grievance and arbitration procedure, what is the union's obligation to bargaining unit employees who claim to have been bullied on the job, and what are the potential contractual bases for pursuing a grievance on behalf of those employees? What about when an employee has been disciplined or discharged by the employer for allegedly bullying others on the job? This part also considers the potentially challenging situation where both the bully and the bullied are members of the bargaining unit. Part Three assesses when bullying-type conduct rises to the level of an unfair labor practice under by the National Labor Relations Act ("NLRA"), which prohibits interference with, restraint, or coercion of employees in the exercise of their statutory right to engage in, or refrain from engaging in, union-related activities. Part Four considers several ways in which the employer's implementation of work rules and policies aimed at curtailing workplace bullying implicates the NLRA; namely, the employer's duty to bargain with the union, and employees' right to engage in protected concerted

¹ Associate, Blitman & King LLP, Syracuse, New York. Blitman & King is a labor and employment firm that represents labor unions, multi-employer benefit plans, and employees. An earlier version of this paper was submitted in conjunction with the 2013 Midwinter Meeting of the Employment Rights & Responsibilities Committee of the ABA's Labor and Employment Law Section.

² As discussed below, proposed legislation, such as New York's Healthy Workplace Bill, seeks to legally define and proscribe "workplace bullying"; however, at the time this paper was submitted, no such legislation had been enacted into law.

activity. Finally, Part Five briefly examines proposed legislation in New York concerning workplace bullying, and how it might impact unions if it becomes law.

I. THE DUTY OF FAIR REPRESENTATION: AN OVERVIEW

Before discussing how the collective bargaining agreement might govern instances of workplace bullying, it is helpful to review the parameters of the union's duty to the employees it represents—the duty of fair representation. While the union's duty of fair representation touches on almost everything a union does, with respect to workplace bullying issues it comes up most frequently in the context of the union's decision to pursue or not pursue a contractual grievance on behalf of an employee involved in bullying.

A. Source and Scope of the Duty

There is no explicit statutory provision stating that unions have a duty of fair representation. However, Section 9(a) of the NLRA provides that representatives of a bargaining unit “shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining”³ Courts have held that a necessary corollary to a union's role as the “exclusive representative” of members of a bargaining unit is “the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts.”⁴

The union's duty extends to all represented employees, i.e., all employees in the applicable bargaining unit. This includes union members as well as non-members. It is important to recognize that the duty arises not from internal union rules governing obligations to members, but from Section 9(a) which establishes the union's role of “exclusive representative” of the entire bargaining unit.⁵

B. Nature of the Duty

To fulfill its duty of fair representation, a union must not engage in conduct toward members of the bargaining unit that is arbitrary, discriminatory, or in bad faith.⁶ Conduct is discriminatory if it is based on irrelevant and invidious distinctions.⁷ This would include distinctions based on an employee's status as a nonmember or political rival, or on the employee's race, religion, gender, national

³ 29 U.S.C. § 159(a).

⁴ *Steele v. Louisville & Nashville RR Co.*, 323 U.S. 192, 202-03 (1944).

⁵ See 29 U.S.C. § 159(a).

⁶ See *Vaca v. Sipes*, 386 U.S. 171, 190 (1967).

⁷ See *Steele*, 323 U.S. at 203.

origin, or other protected trait.⁸ Indeed, Title VII of the Civil Rights Act of 1964 specifically covers labor organizations as well as employers.⁹

Bad faith conduct is that which involves fraud, deceit, dishonesty, or improper motives.¹⁰ This might include intentionally misleading employees as to their contractual rights or deadlines for filing grievances, or refusing to process a grievance because of personal animosity. Even if a union decides to pursue a grievance, a violation may occur if it does so in a “perfunctory, apathetic, indifferent and cursory way approaching the level of bad faith.”¹¹

Determining whether union conduct is so arbitrary that it rises to the level of a breach of the duty of fair representation is a fact-sensitive inquiry, and thus difficult to reduce to a clear and simple test. However, any doubts as to the arbitrariness of union conduct are usually resolved in favor of the union. According to the Supreme Court, a union’s actions are arbitrary “only if, in light of the factual and legal landscape at the time of the union’s actions, the union’s behavior is so far outside a ‘wide range of reasonableness’ as to be irrational.”¹²

Ultimately, however, an employee has no absolute right to have his or her grievance taken to arbitration.¹³ As long as the union makes an adequate investigation into the facts, and its interpretation of the contract has some basis in reason, its decision as to whether to process the grievance will not be considered arbitrary or otherwise inconsistent with its duty of fair representation.

II. WORKPLACE BULLYING AND THE COLLECTIVE BARGAINING AGREEMENT

In a union shop, many of the rights and responsibilities of employees and management are governed by a collective bargaining agreement. While not every contract is the same, many labor agreements contain provisions which bear on conduct that might be described as “bullying.” Further, most labor agreements contain a grievance and arbitration mechanism through which alleged contract violations, sometimes including those arising from instances of workplace bullying, are processed. Thus, whether the union’s obligation is to the bullied or the bully, or both, the applicable collective bargaining agreement and its grievance and arbitration procedure may well play an important role in the resolution of the issue.

⁸ *See id.*

⁹ *See* 42 U.S.C. §§ 2000e(d), 2000e-2(c).

¹⁰ *See Humphrey v. Moore*, 375 U.S. 335, 348 (1964).

¹¹ *See Webb v. ABF Freight Sys., Inc.*, 155 F.3d 1230, 1240 (10th Cir. 1998).

¹² *Air Line Pilots Ass’n v. O’Neill*, 499 U.S. 65, 67 (1991).

¹³ *See Vaca*, 386 U.S. at 194-95.

A. Pursuing a Contractual Grievance On Behalf of the Bullied

In determining whether or not to pursue a grievance on behalf of an employee who complains that he or she has been bullied by a supervisor or a coworker, the union should conduct a reasonable investigation into the facts and review the collective bargaining agreement to determine which, if any, of its provisions apply to the conduct at issue. Below are several examples of contract clauses that might support a grievance against the employer for instances of workplace bullying perpetrated by a supervisor or a coworker, or both.

1. *Anti-Discrimination Clauses*

Many collective bargaining agreements contain provisions prohibiting employer discrimination against employees based on race, religion, gender, age, disability, sexual orientation, and other protected categories. These provisions typically mirror or refer to existing anti-discrimination statutes, including Title VII of the Civil Rights Act of 1964. Below is a hypothetical example of such a provision:

Neither the Employer nor the Union shall discriminate against any employee who may be a qualified disabled individual, a disabled veteran or a veteran of the Vietnam era or because of race, religion, color, national origin, creed, sex, age, marital status, political affiliation or sexual orientation, or membership or nonmembership in the Union.

Thus, to the extent an employee is bullied by a supervisor because of his or her membership in a protected class, and the collective bargaining agreement prohibits such conduct, there may be a contractual grievance to pursue (even if the employee also has a statutory right of action independent of the labor contract). When considering issues under anti-discrimination clauses, labor arbitrators often look to statutory anti-discrimination standards in analyzing whether conduct rises to the level of an adverse employment action. As such, a contract violation based on discrimination probably will not be found unless the bullying is akin to severe and pervasive harassment as required under Title VII and analogous state statutes.

2. *Health & Safety Clauses*

Historically, contract provisions concerning employee “health and safety” referred to the protection of life and limb for workers in physically dangerous lines of work. However, today many labor contracts contain broad provisions related to employee health and safety which may put a contractual onus on employers to deal with workplace bullying.

Collective bargaining agreements may expressly address workplace violence and require that the employer take affirmative steps to maintain a healthy and safe work environment for employees. Below is a hypothetical example of a contract provision dealing with employee health and safety as well as workplace violence and threats of violence:

The employer is committed to employee health and safety. Workplace violence, including threats of violence by or against an employee, will not be tolerated and should be immediately reported whether or not physical injury occurs.

Notably, the Occupational Safety and Health Administration considers (at least informally) workplace violence to include threats of violence and verbal abuse.¹⁴ As such, depending on how broadly they are worded, contract provisions related to the employer's obligation to maintain a healthy and safe work environment may provide a basis for pursuing a grievance in connection with workplace bullying.

3. *"Mutual Respect" or Anti-Bullying Clauses*

Depending on the union and industry, collective bargaining agreements may contain "mutual respect" or even anti-bullying clauses. The inclusion of such clauses in labor agreements is more common in the service and health care industries, rather than in the construction trades, for example, but there appears to be a growing trend in favor of such contract language in those areas. For instance, here is a sample "mutual respect" clause based on contract language negotiated by Locals 207 and 282 of the Service Employees International Union/National Association of Government Employees ("SEIU/NAGE"):

Behaviors that contribute to a hostile, humiliating or intimidating work environment, including abusive language or behavior, are unacceptable and will not be tolerated. Employees who believe they are subject to such behavior should raise their concerns with an appropriate manager or supervisor. In the event the employee's concerns are not addressed internally within a reasonable period of time, the employee or the Union may file a grievance. Grievances filed under this section shall not be subject to the arbitration provisions set forth in this contract.¹⁵

¹⁴ See OSHA Fact Sheet on Workplace Violence available at http://www.osha.gov/OshDoc/data_General_Facts/factsheet-workplace-violence.pdf.

¹⁵ A copy of the SEIU/NAGE collective bargaining agreement is available at http://www.nage.org/state/pdf/UNIT6_2009-2012_CBA.pdf.

Contract provisions may go so far as to define and expressly prohibit “bullying,” such as this sample provision based on language from a collective bargaining agreement negotiated by Local 1921 of the Government Accountability Office Employees Organization, International Federation of Professional and Technical Engineers (“IFPTE”):

*The parties will not tolerate bullying behavior, which is defined as repeated inappropriate behavior, either direct or indirect, whether verbal, physical, or otherwise, by one or more persons against another or others, at the place of work and/or in the course of employment. Examples of bullying could include: slandering, ridiculing or maligning a person or his or her family; persistent name calling which is hurtful, insulting or humiliating; using a person as a butt of jokes; abusive and offensive remarks.*¹⁶

Such “mutual respect” or anti-bullying clauses would, of course, provide a fairly concrete basis for pursuing a grievance on behalf of an employee subjected to bullying-type behavior. Notably, however, contract provisions like the one from the SEIU/NAGE contract would foreclose the arbitration of grievances not resolved to the satisfaction of the union or the affected employee through internal processes.

In sum, each collective bargaining agreement is different because it reflects the different interests, values, and traditions of the signatory parties. Some unions may insist on the inclusion of clear rules prohibiting bullying-type conduct, while others may avoid it at all costs for fear that it would be used by the employer as a weapon against their members. In any event, in assessing whether to pursue a contractual grievance on behalf a bullied employee, the union should carefully review the contract to determine whether there is a contractual basis for pursuing the matter.

B. Pursuing a Contractual Grievance on Behalf of the Alleged Bully

The union has a duty to fairly represent all bargaining unit employees, including employees who have been accused of bullying. In fact, in many industries it is a far more common scenario for the union to defend an alleged bully against discipline or discharge, than it is for the union to advocate on behalf of a victim of bullying. When an employer seeks to discipline or discharge an employee for engaging in bullying-type conduct, the issue usually is whether the employer had “just cause” to do so.

¹⁶ A copy of the GAO Employees/IFPTE contract is available at <http://gaoemployees.org/Downloads/Agreements/analystCBA.pdf>.

Most collective bargaining agreements require that employers have “just cause” or “reasonable cause” before disciplining or discharging a bargaining unit employee. Such clauses, meant to protect employees from arbitrary employer action, are a pillar of the labor-management relationship. As one arbitrator put it:

[Just cause provisions] exclude discharge for mere whim or caprice. They are, obviously, intended to include those things for which employees have traditionally been fired. They include the traditional causes of discharge in the particular trade or industry, the practices which develop in the day-to-day relations of management and labor and most recently they include the decisions of courts and arbitrators. . . . They include such duties as honesty, punctuality, sobriety, or conversely, the right to discharge for theft, repeated absence of lateness, destructions of company property, brawling and the like. Where they are not expressed in posted rules, they may very well be implied, provided they are applied in a uniform, non-discriminatory manner.¹⁷

Discipline and discharge cases involving issues of just cause make up a substantial percentage of labor arbitrations. The conduct at issue in these cases varies widely, even within the realm of conduct that might be described as “bullying.” So too do arbitrators’ decisions as to what employee conduct provides the employer with just cause to discipline or discharge. As such, it is not helpful to survey the landscape of labor arbitration decisions in this area. However, there are some identifiable trends in the areas of violence and threats of violence in the workplace that merit some discussions.

It is generally accepted that employers have a duty to protect their employees from violence and threats of violence in the workplace. Indeed, some would argue that recent arbitration decisions reflect a trend in favor of finding just cause where an employer seeks to remove employees who engage or threaten to engage in violent acts toward others.¹⁸ For example, threatening conduct and utterances directed toward co-workers likely would provide proper grounds for discipline where the recipient reasonably fears for his or her safety.¹⁹ Of course, the context in which the threatening behavior occurs is highly relevant to the analysis. The more egregious the conduct or utterance, the more likely an arbitrator is to find that discipline is appropriate.²⁰ Similarly, specific threats of imminent harm to another employee, if credible, may well provide just cause.²¹ On the other hand, if a reasonable person

¹⁷ *Worthington Corp.*, 24 Lab. Arb. Rep. (BNA) 1, 6-7 (1955) (McGoldrick et al., Arbs.).

¹⁸ *See Discipline & Discharge in Arbitration* at 348 (Brand, Biren eds. BNA Books 2008).

¹⁹ *See id.* at 350.

²⁰ *See id.* at 350 (citing cases).

²¹ *See id.*

subjected to the same threats, under all the circumstances, would not believe harm might ensue, or where the actual response to the behavior does not reflect fear or concern, it is less likely that discipline will be deemed appropriate.²²

Employee conduct that is not particularly egregious or disturbing in nature, but that is part of a history of harassing behavior may give the employer just cause for discipline or discharge. In one case, an arbitrator found just cause despite acknowledging that “there was no direct threat shown to have been made by lifted arm or proffered weapon to or at any person. . . [and] even the wild and unseemly language used by the grievant, was couched in conditional language.”²³ However, the arbitrator continued: “Out of context, taken separately, they may not have been immediate active threats [but] [t]he record is clear that the supervisors and the personnel manager felt a deep fear of this employee The grievant terrified these supervisors.”²⁴ Thus, persistently abusive conduct, though not severe in nature, may provide sufficient grounds for discipline or discharge.

In considering whether to invoke the grievance-arbitration mechanism on behalf of a bargaining unit employee accused of bullying, the union should be mindful of these recent trends in the areas of workplace violence and threats of violence.

C. Representing Both the Bullied and the Bully

It is not uncommon for workplace bullying to involve two or more bargaining unit employees with competing interests. The most obvious scenario is where the union represents both the bullied and the bully. For obvious reasons, this can be an awkward situation for the union.

While lawyers are generally prohibited from representing two clients with competing interests, there is no analogous “conflict of interest” principle in the context of a union’s duty to fairly represent employees.²⁵ In *Humphrey v. Moore*, the Supreme Court stated that unions “should [not] be neutralized when the issue is chiefly between two sets of employees. Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes.”²⁶

²² See *id.* at 351 (citing *Ryder/ATE*, 111 Lab. Arb. Rep. (BNA) 1038 (1999) (Prayzich, Arb.)).

²³ *Elastomeric Prods. Inc.*, 94 Lab. Arb. Rep. (BNA) 610, 615 (1990) (Cantor, Arb.).

²⁴ *Id.*

²⁵ See *Labor Union Law & Regulation* 325 (Osborne ed., BNA Books 2003).

²⁶ 375 U.S. 335, 349-50 (1964).

This principle was reaffirmed in *Marshall v. Ormet Corp.*²⁷ In that case, the plaintiff employee alleged racial harassment at the hands of a coworker. Both the plaintiff and the alleged harasser were represented by the same union. The plaintiff alleged that the union violated its duty of fair representation when it represented the alleged harasser at the grievance and arbitration stage because it had a conflict of interest in doing so. The court granted summary judgment to the union, stating that “[u]nder *Humphrey v. Moore* . . . a union must and can, without violating anyone’s rights, represent employees with conflicting interests. Moreover, when faced with a conflict between its members, a union need not act neutrally.”²⁸

In situations where the union owes an affirmative and concurrent duty to two employees with competing interest, the union should be careful not to choose to pursue one employee’s cause over another’s based on invidious or irrelevant considerations. Nor should it let personal animosity or intra-union political issues affect its decision as to how to handle the situation. Similarly, union conduct based on general predispositions or prejudices toward the bullied (e.g., “they are all wimps”), or bullies (e.g., “they all deserve a life sentence without parole”), may constitute arbitrary conduct in violation of the duty of fair representation.

If competing grievances are in order, the union may seek to have them heard by different arbitrators or assign separate business agents to the cases,²⁹ though no such practice is required by the duty of fair representation. The union may also reasonably conclude that only one, or neither, of the employees’ grievances is worth pursuing due to the merits of the complaints, limited union resources, or any other such reason that is not discriminatory, in bad faith, or “so far outside a ‘wide range of reasonableness’ as to be irrational.”³⁰

III. WORKPLACE BULLYING AS UNFAIR LABOR PRACTICE

While many of the rights and responsibilities of employees and employers in the unionized workplace are governed by the collective bargaining agreement, others are governed by statute and exist independent of the contract. The National Labor Relations Act (“NLRA”),³¹ is particularly relevant to this discussion because it proscribes bullying-type conduct motivated by an employee’s union involvement.

Congress’s intent in passing the NLRA was to protect “the exercise by workers of full freedom of association, self-organization, and designation of

²⁷ 736 F. Supp. 1462 (S.D. Ohio 1990).

²⁸ *Id.* at 1471.

²⁹ See Labor Union Law & Regulation 325-27.

³⁰ *Air Line Pilots Ass’n v. O’Neill*, 499 U.S. 65, 67 (1991).

³¹ 29 U.S.C. §§ 151-69

representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”³² To that end, Section 7 of the NLRA grants employees the right to form, join, or assist labor organizations, and also the right to refrain from doing so:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.³³

Section 8(a) of the NLRA makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of” their Section 7 rights; “to dominate or interfere with the formation or administration of any labor organization”; or to engage in discrimination intended to “encourage or discourage membership in any labor organization.”³⁴ Similarly, unions may not restrain or coerce employees in the exercise of their Section 7 rights, including the right to refrain from joining or supporting a union.³⁵ Unfair labor practices are brought before and remedied by the National Labor Relations Board (“Board”) and may be pursued by an employee, a union, or an employer.³⁶

Accordingly, when an employer or its agent engages in bullying-type behavior with the purpose or effect of improperly dissuading employees from joining or supporting a union, it has committed an unfair labor practice.³⁷ Two examples of such conduct are explored below.

³² 29 U.S.C. § 151.

³³ 29 U.S.C. § 157.

³⁴ 29 U.S.C. § 158(a).

³⁵ *See id.*

³⁶ *See* 29 U.S.C. § 160 (“The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce.”).

³⁷ It is also an unfair labor practice for an employer to interfere with an employee’s right to engage in protected concerted activity under Section 7 and 8(a) of the NLRA. *See* 29 U.S.C. §§ 157, 158(a). That type of unfair labor practice is discussed at Part IV below in the context of the employer’s implementation of an anti-bullying policy.

A. Employer Violence and Threats of Violence

Employers are not permitted to engage in violence or threats of violence against employees based on their involvement in union-related activities. Thus, in *Northwest Graphics, Inc.*,³⁸ the Board found that the employer committed an unfair labor practice when a supervisor berated an employee for wearing a union button. The supervisor in that case physically hit the employee's button while shouting "with mistakes like this, how dare you shove this shit down my throat?"³⁹ The supervisor then referred to the button (and what it represented) as the "mistake" and said "[h]ow dare you ask for more money?"⁴⁰ The Board concluded that the supervisor's verbal and physical outburst "reasonably conveyed a threat of lower wages or unspecified reprisals in retaliation for employees' support for the Union."⁴¹

Similarly, in *Garvey Marine, Inc.*,⁴² employer threats of violence during a union organizing campaign were found to constitute an unfair labor practice. In that case, a supervisor threatened to beat up union supporters and told pro-union employees "how easy it would be to arrange a fatal accident for a deckhand."⁴³ The supervisor also "announced that he kept a pistol for anyone who tried to keep him from working during a strike, an eventuality that he claimed would inevitably follow the deckhands' choice of a union."⁴⁴ The Board held that "such powerful and dramatic threats of harm to employees, in the same way as threats to close or to discharge employees because of their union support, create precisely the legacy of coercion that endures in the workplace"⁴⁵

Thus, when an employer uses violence or threats of violence to bully employees based on their support for union activities, the employees and their union have recourse in the form of an unfair labor practice charge under the NLRA.

B. Interrogation of Employees

While an employer's interrogation of employees about union-related activities is not illegal per se, it constitutes an unfair labor practice under the NLRA if it tends to restrain, coerce, or interfere with employee rights to join, assist, or support

³⁸ 342 NLRB 1288 (2004).

³⁹ *Id.* at 1288.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² 328 NLRB 991 (1999).

⁴³ *Id.* at 994.

⁴⁴ *Id.*

⁴⁵ *Id.* at 994-95.

union activity.⁴⁶ Whether employer interrogation rises to the level of an unfair labor practice is analyzed on a case-by-case basis and ultimately depends on the totality of the circumstances.⁴⁷ For example, the U.S. Court of Appeals for the Second Circuit has considered the following factors:

- (1) The background, i. e. is there a history of employer hostility and discrimination?
- (2) The nature of the information sought, e. g. did the interrogator appear to be seeking information on which to base taking action against individual employees?
- (3) The identity of the questioner, i. e. how high was he in the company hierarchy?
- (4) Place and method of interrogation, e. g. was employee called from work to the boss's office? Was there an atmosphere of "unnatural formality"?
- (5) Truthfulness of the reply.⁴⁸

Similarly, the Board has recently stated that "[a]mong the factors that may be considered in making such an analysis are the identity of the questioner, the place, and method of the interrogation, the background of the questioning and the nature of the information sought, and whether the employee is an open union supporter."⁴⁹ In *Scheid Electric*, the Board found that the employer committed an unfair labor practice when the company's owner interrogated a union steward about his union sympathies and insinuated that the employee would lose his employment.⁵⁰ The Board noted that the interrogator was the highest ranking official at the company and conducted the meeting in his office.⁵¹ Further, it found that the substance and context of the questioning was coercive because it suggested that the employer was prepared to withdraw recognition from the union and had a tendency to "force the employees to abandon their sympathy for and allegiance to the Union. . . ."⁵² The Board also found that the employee's status as an open union supporter "would reinforce, rather than ameliorate" the coercive effect of the interrogation because it suggested to the employee that the union's status and "his representational duties were in jeopardy."⁵³

⁴⁶ See *Rossmore House*, 269 NLRB 1176, 1177 (1984), enf. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

⁴⁷ See *id.*

⁴⁸ *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964).

⁴⁹ *Scheid Elec. & IBEW, Local 343*, 355 NLRB 160 (2010).

⁵⁰ See *id.* at 160-61.

⁵¹ See *id.* at 160.

⁵² *Id.* at 160 (internal quotation marks omitted).

⁵³ *Id.*

Accordingly, unions and employees are protected from employer bullying in the form of interrogations and coercive behavior that is motivated by employees' involvement in union-related activities.

IV. EMPLOYER ANTI-BULLYING POLICIES AND THE NLRA

The relatively recent focus on bullying as a employment relations problem⁵⁴ has prompted many employers to issue written policies, or amend existing ones, aimed at curbing bullying-type behavior in the workplace. In the unionized workplace, this implicates the parties' legal rights and responsibilities in significant ways. As discussed below, employer implementation of anti-bullying policies must be squared with (a) the employer's obligation to bargain with the union over changes to employees' terms and conditions of employment, and (b) the employees' statutory right to engage in protected concerted activity under Section 7 of the NLRA.

A. Employer's Obligation to Bargain With the Union

Section 8(a) of the National Labor Relations Act provides that “[i]t shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees”⁵⁵ Section 8(d) of the Act defines collective bargaining as “the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.”⁵⁶ Under this statutory scheme, an employer violates the NLRA when it unilaterally makes material changes to employees' terms and conditions of employment on subjects of mandatory bargaining—i.e., wages, hours, and other terms and conditions—without first affording notice and a meaningful opportunity to bargain.⁵⁷

To be sure, anti-bullying or harassment policies that could be grounds for employee discipline or discharge are mandatory subjects of bargaining.⁵⁸

⁵⁴ David C. Yamada, *Crafting a Legislative Response to Workplace Bullying*, EMPLOYEE RIGHTS & EMPLOYMENT POLICY JOURNAL 475, 477-78 (2004) (noting that the concept of workplace bullying did not even “enter the vocabulary of American employment relations until the late 1990s”).

⁵⁵ 29 U.S.C. § 158(a).

⁵⁶ 29 U.S.C. § 158(d).

⁵⁷ See *NLRB v. Katz*, 369 U.S. 736 (1962); *United Cerebral Palsy of New York City*, 347 NLRB 603, 608 (2006).

⁵⁸ See, e.g., *Southern Mail, Inc.*, 345 NLRB 644, 646 (2005) (“Mandatory subjects of bargaining include the circumstances in which discipline will be imposed for violations of employer policies.”); *Flambeau Arnold Corp.*, 334 NLRB 165, 166 (2001) (duty to bargain existed regarding changes to sick leave policy providing for employee discipline); *Bath Iron Works Corp.*, 302 NLRB

Accordingly, work rules and policies prohibiting bullying-type conduct under penalty of discipline or discharge cannot be implemented or materially changed by the employer without first providing the union with timely notice and an opportunity to bargain.

While the NLRA does not “compel either party to agree to a proposal or require the making of a concession,”⁵⁹ it does require that the parties bargain in good faith. Good faith bargaining is that which is done with a “bona fide intent to reach an agreement.”⁶⁰ Thus, an employer does not satisfy its bargaining obligations with respect to the implementation of an anti-bullying policy simply by going through the motions. Rather, the employer’s actions must reflect a genuine desire to achieve a mutually agreeable resolution.

The union’s right to engage in bargaining over anti-bullying policies with disciplinary elements also encompasses the right to information relevant to the proposed change.⁶¹ To establish relevance, the union need “only demonstrate that the requested information is probably relevant and that it will be of use to the union in carrying out its statutory duties and responsibilities.”⁶² The Board has adopted a “liberal discovery type standard” which allows unions to access a broad range of potential useful information for the purposes of effectuating the bargaining process.⁶³ Indeed, “not much is required to justify a union’s request for information that is related to its bargaining unit representation functions.”⁶⁴ As such, to satisfy its bargaining obligation vis-à-vis a proposed anti-bullying policy, an employer must comply with any request from the union for information relevant to the proposed policy and its impact on employees within the bargaining unit.

An employer may be excused from its obligation to bargain over the implementation of an anti-bullying policy, but only if the union has clearly and unmistakably waived its right to bargain over the same. It is well settled that “national labor policy disfavors waivers of statutorily protected rights,”⁶⁵ and thus

898, 902 (1991) (duty to bargain existed regarding changes to alcohol and drug policies which “created entirely new grounds for discipline”).

⁵⁹ *Barry-Wehmiller Co.*, 271 NLRB 471, 472 (1984).

⁶⁰ *Atlas Mills*, 3 NLRB 10, 21 (1937).

⁶¹ See *Levingston Shipbuilding Co.*, 244 NLRB 119, 121 (1979) (discussing duty to provide information generally), *enfd.* 617 F.2d 294 (5th Cir. 1980).

⁶² *Kathleen’s Bakeshop, LLC*, 337 NLRB 1081, 1093 (2002).

⁶³ *NLRB v. Acme Indus. Corp.*, 385 U.S. 432 (1967).

⁶⁴ *Crowley Marine Servs. v. NLRB*, 234 F.3d 1295, 1297 (D.C. Cir. 2000).

⁶⁵ *Olivetti Office USA, Inc. v. NLRB*, 926 F.2d 181, 187 (2d Cir. 1991); see *Local Union 36, Int’l Bhd. of Elec. Workers v. NLRB*, 706 F.3d 73, 84-85 (2d Cir. 2013).

only “clear and unmistakable” waivers of such rights are recognized by the Board.⁶⁶ Notably, the “clear and unmistakable” waiver standard adopted and consistently applied by the Board has also been approved by the Supreme Court.⁶⁷ The employer bears the burden of proving a defense based on the union’s waiver of its statutory right to bargain over the implementation of an anti-bullying or similar policy.⁶⁸

B. Employees’ Right to Engage in Protected Concerted Activity

As noted above, Section 7 of the NLRA provides that “[e]mployees shall have the right to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection”⁶⁹ Under the NLRA, employers may not implement work rules or policies which tend to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.⁷⁰ Before discussing how employer anti-bullying policies implicate employees’ Section 7 rights, it is necessary to briefly review the underlying concept of “protected concerted activity.”

1. Concerted Activity

Only conduct that is “concerted” comes within the ambit of Section 7. Conduct is “concerted” under Section 7 if it is undertaken by two or more employees, or by one employee on behalf of others.⁷¹ Concerted activity includes individual employees seeking to initiate, induce, or prepare for group action, as well as individual employees bringing group complaints to the attention of management.⁷² Concerted activity generally does not include an activity by a single employee for

⁶⁶ See *Provena Hospitals*, 350 NLRB 808, 809-15 (2007). *But see Enloe Med. Ctr. v. NLRB*, 433 F.3d 834, 839 (D.C. Cir. 2004) (applying different contract waiver standard).

⁶⁷ See *NLRB v. C&C Plywood Corp.*, 385 U.S. 421 (1967) (upholding Board’s application of the “clear and unmistakable waiver” standard in finding that a provision in a collective bargaining agreement did not constitute a waiver of the union’s bargaining rights); *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983) (“We will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is ‘explicitly stated.’ More succinctly, the waiver must be clear and unmistakable.”).

⁶⁸ See *Olivetti*, 926 F.2d at 187; *NLRB v. N.Y. Tel. Co.*, 930 F.2d 1009, 1011 (“The employer bears the weighty burden of establishing that a “clear and unmistakable” waiver has occurred.”).

⁶⁹ 29 U.S.C. § 157.

⁷⁰ See 29 U.S.C. § 158(a).

⁷¹ See *Meyers Indus.*, 268 NLRB 493, 497 (1983).

⁷² See *id.*; see also *Alton H. Piester*, 353 NLRB 369 (2008) (finding that an individual who repeats a complaint previously expressed by a larger group of employees engages in concerted activity because this is a continuation of concerted activity).

that individual's own personal benefit; however, individual activity involving attempts to enforce provisions of a collective bargaining agreement is concerted.⁷³

2. *Protected Activity*

In order to avail themselves of Section 7's protections, employees who engage in concerted conduct must do so for the purpose of "mutual aid or protection."⁷⁴ Employees engage in such protected activity when their efforts are aimed at improving the terms and conditions of employment.⁷⁵ This includes when employees act to "improve their lot as employees through channels outside the immediate employee-employer relationship."⁷⁶

Conduct that is satirical or even scornful toward the employer or coworkers but that is still aimed at improving working conditions is for mutual aid or protection under the NLRA.⁷⁷ However, actions that are intended merely to belittle or harass the company or other coworkers and not to protest working conditions are not protected.⁷⁸ Indeed, "some concerted activity bears a less immediate relationship to employees' interests as employees than other such activity," and "at some point the relationship becomes so attenuated that an activity cannot fairly" be viewed as for the purpose of mutual aid and protection.⁷⁹

3. *Implications for Anti-Bullying Policies*

Not only are employers prohibited from directly disciplining or discharging employees for engaging in protected concerted activity under Section 7, they are also prohibited from implementing work rules or policies that have the effect of restraining employees in the exercise of Section 7 rights. Thus, in implementing anti-bullying policies, employers may not prohibit a broad swath of bullying-type conduct that also encompasses statutorily protected acts.

⁷³ See *Interboro Contractors*, 157 NLRB 1295 (1966); see also *NLRB v. City Disposal Sys.*, 465 U.S. 822 (1984) ("An individual's invocation of a right rooted in the collective bargaining agreement is an integral part of the collective bargaining process and is therefore a 'concerted' activity even though the individual employee may not have cited the CBA or stated that he was acting on behalf of others.").

⁷⁴ 29 U.S.C. § 157.

⁷⁵ See *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978).

⁷⁶ *Id.*

⁷⁷ See *Reef Indus. v. NLRB*, 952 F.2d 830 (5th Cir. 1991).

⁷⁸ See *New River Indus. v. NLRB*, 945 F.2d 1290 (4th Cir. 1991).

⁷⁹ *Eastex*, 437 U.S. at 567-68.

As a general rule, in determining whether the maintenance of work rules or policies violates the Act, “the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights.”⁸⁰ “If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.”⁸¹

In *Claremont Resort & Spa*, the Board found that the employer violated the NLRA by issuing and maintaining a policy stating that “Negative conversations about associates [i.e., coworkers] and/or managers are in violation of our Standards of Conduct that may result in disciplinary action.”⁸² The Board held that “the rule’s prohibition of ‘negative conversations’ about managers would reasonably be construed by employees to bar them from discussing with their coworkers complaints about their managers that affected working conditions, thereby causing employees to refrain from engaging in protected activities.”⁸³ As such, the policy was deemed unlawful.

Similarly, in *Hispanics United of Buffalo, Inc.*, the Board found unlawful the discharge of several employees under a “zero tolerance” policy prohibiting “bullying and harassment.”⁸⁴ The employees in that case had posted comments on Facebook critical of their supervisor, which the Board held to be protected concerted activity under the NLRA.⁸⁵ The Board also found that the employer could not lawfully apply its anti-bullying policy because “legitimate managerial concerns to prevent harassment do not justify policies that discourage the free exercise of Section 7 rights by subjecting employees to . . . discipline on the basis of the subjective reactions of others to their protected activity.”⁸⁶

In contrast, the Acting General Counsel recently concluded that an employer’s policy regarding online bullying was lawful under the NLRA.⁸⁷ The relevant policy stated, in pertinent part, that “any harassment, bullying, discrimination, or retaliation that would not be permissible in the workplace is not

⁸⁰ *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999).

⁸¹ *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004).

⁸² 344 NLRB 832, 832 (2005) (alteration added).

⁸³ *Id.*

⁸⁴ 359 NLRB No. 37, slip op. at 2 (Dec. 14, 2012).

⁸⁵ *Id.*

⁸⁶ *Id.* at 3 (quoting *Consol. Diesel Co.*, 332 NLRB 1019, 1020 (2000), *enfd.* 263 F.3d 345 (4th Cir. 2001)).

⁸⁷ NLRB, Office of the Gen. Counsel, Memo. OM 12-59 at 12-14 (May 30, 2012).

permissible between co-workers online, even if it is done after hours, from home and on home computers.”⁸⁸ Without much explanation, and arguably contrary to Board precedent, the Acting General Counsel found that employees would not reasonably construe that language to prohibit protected concerted activity because “the rule contains a list of plainly egregious conduct, such as bullying and discrimination.”⁸⁹ As such, the Acting General Counsel deemed that anti-bullying provision consistent with the NLRA.

Finally, it should be noted that the inclusion of a disclaimer or “savings clause” in an anti-bullying policy will not necessarily cure an unlawfully overbroad provision contained therein. An example of such a clause might be: “Notwithstanding the foregoing, nothing herein shall be construed as limiting any employee’s rights under of National Labor Relations Act.” To the extent such a clause would require employees to be labor lawyers in order to understand the full panoply of their rights under the NLRA, and thus what activities truly are permitted despite the overbroad language, it would not render an otherwise overbroad policy lawful.⁹⁰ On the other hand, if a savings clause adequately clarifies overbroad provisions such that a reasonable employee would understand that he or she is not prohibited from engaging in any activities protected by Section 7, it may well have some curative effect.

In sum, while employers’ efforts to address the problem of workplace bullying are commendable, in the unionized workplace, they generally must bargain with the union over the implementation of anti-bullying work rules or policies. Further, overbroad policies that have the purpose or effect of chilling employees’ Section 7 rights will not pass muster under the NLRA, and thus may subject the employer to an unfair labor practice charge.

V. NEW YORK’S HEALTHY WORKPLACE BILL

On February 13, 2013, bill number A4965, known as the Healthy Workplace Bill, was introduced in the New York State Assembly. Shortly thereafter, an identical bill, number S3863, was introduced in the Senate. The bill would amend the New York Labor Law “in relation to establishing healthy workplaces” and would establish a civil cause of action for employees who are subject to an “abusive work environment.”⁹¹ A prior version of the bill introduced in the 2010 legislative session actually passed in the Senate, but ultimately failed to become law.

⁸⁸ *Id.* at 13.

⁸⁹ *Id.* at 13-14.

⁹⁰ See NLRB Memo. OM 12-59 at 12, 14.

⁹¹ See Assemb. B. A4965, 2012-13 Reg. Sess. (N.Y. 2013).

A. Findings and Purpose

The proposed bill is premised on findings that workplace bullying affects at least one-third of employees during their working lives and can cause serious physical and psychological harm.⁹² It is also based on the finding that legal protection from abusive work environments “should not be limited to behavior grounded in a protected class status as required by employment discrimination statutes.”⁹³ The stated purpose of the bill is “to provide legal redress for employees who have been harmed psychologically, physically or economically by deliberate exposure to abusive work environments; and to provide legal incentives for employers to prevent and respond to abusive mistreatment of employees at work.”⁹⁴

B. Substantive Provisions

The bill provides that “[n]o employee shall be subjected to an abusive work environment.”⁹⁵ “Abusive work environment” is defined as “an employment condition when an employer or one or more of its employees, acting with intent to cause pain or distress to an employee, subjects that employee to abusive conduct that causes physical harm, psychological harm or both.”⁹⁶ The bill defines “abusive conduct” as “acts, omissions, or both, that a reasonable person would find abusive, based on the severity, nature, and frequency of the conduct, including but not limited to: repeated verbal abuse such as the use of derogatory remarks, insults, and epithets; verbal, non-verbal, or physical conduct of a threatening, intimidating, or humiliating nature; or the sabotage or undermining of an employee’s work performance.”⁹⁷ According to the bill, “[a] single act normally shall not constitute abusive conduct, but an especially severe and egregious act may meet this standard.”⁹⁸

The bill also contains an anti-retaliation provision: “No employer or employee shall retaliate in any manner against an employee who has opposed any unlawful employment practice under this article”⁹⁹ An employer may be vicariously liable for violations committed by an employee, and an employee may be

⁹² *See id.* at 2.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 3.

⁹⁶ *Id.* at 2.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 3.

individually liable for a violation, subject to various affirmative defenses.¹⁰⁰ The bill provides for a one-year statute of limitations.¹⁰¹

Finally, the proposed legislation provides for extensive remedies for aggrieved employees.¹⁰² Plaintiffs may be entitled to injunctive relief, reinstatement, removal of the bully from the plaintiff's work environment, back pay, front pay, medical expenses, compensation for pain and suffering, emotional distress damages, punitive damages, and attorney's fees.¹⁰³

C. Impact on Collective Bargaining Agreements and Unions

Importantly, the Healthy Workplace Bill as introduced in the New York Legislature contains a provision specifically addressing the effect of the law on collective bargaining agreements:

This Article shall not prevent, interfere, exempt or supersede any current provisions of an employee's existing collective bargaining agreement which provide greater rights and protections than prescribed in this Article nor shall this Article prevent any new provisions of the collective bargaining agreement which provide greater rights and protections from being implemented and applicable to such employee within such collective bargaining agreement.¹⁰⁴

The proposed legislation also provides that "[w]here the collective bargaining agreement provides greater rights and protections than prescribed in this Article, the recognized collective bargaining agent may opt to accept or reject to be covered by the provisions of this Article."¹⁰⁵ The potential import of this provision is not entirely clear, given that unions seemingly would not have much to gain from opting out of the statute's protections. Indeed, doing so may well invite claims for violation of the duty of fair representation. Notably, the bill has received official support from the New York State AFL-CIO and a number of major New York unions.

¹⁰⁰ *See id.*

¹⁰¹ *See id.*

¹⁰² *See id.*

¹⁰³ *See id.*

¹⁰⁴ *Id.* at 4.

¹⁰⁵ *Id.*

CONCLUSION

Given the present lack of legislation pertaining specifically to workplace bullying, unions should consider cases of bullying within existing legal frameworks. This means looking to the collective bargaining agreement to see if there is a grievance to pursue on behalf of the bullied, the bully, or both. It also means looking to the NLRA when employer bullying tends to restrain employees in the exercise of their right to engage in union activities. Unions should also be prepared to demand bargaining when employers seek to implement anti-bullying policies, and ensure that such policies do not infringe on employees' statutory right to engage in protected concerted activity. Finally, Unions should be mindful of proposed legislation that seeks to prohibit workplace bullying, such as New York's Healthy Workplace Bill, and be prepared to address its impact should it become law.