



# Workplace Bullying and Harassment

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Workplace bullying and protected class harassment are widespread in U.S. workplaces.<sup>1</sup> These behaviors create toxic work environments, which often result because leaders are not paying attention, or they choose to ignore the people problems in their workplace. Leaders who overlook these problems are not only harming their employees but their business as well. Bullies and harassers cause good employees to leave and demoralize the staff that stay, resulting in quantifiable costs related to turnover, hiring, retraining, poor customer relations, lost productivity, increased time off, and insurance claims.<sup>2</sup> This article offers an overview and some practical solutions to these problems.

## Bullying and Harassment - What is the Difference?

Bullying is defined by the Workplace Bullying Institute as repeated mistreatment of an employee by one or more employees, and includes abusive conduct that is threatening, humiliating, or intimidating.<sup>3</sup> Unlawful harassment is like bullying in the sense that the conduct is unwelcome, offensive, and severe or pervasive enough to create an intimidating, hostile, or abusive environment.<sup>4</sup> The primary difference between the two is that unlawful harassment is always motivated by the victim's protected class status.

## What Behavior is Unlawful?

The Wisconsin Fair Employment Act prohibits harassment and bullying that is based on another person's protected class status, such as sex, race, national origin, religion, age, or disability, to name only a few.<sup>5</sup> Workplace bullying in Wisconsin is not unlawful when it is not based on protected class status.

However, nonprotected class bullying that causes physical or mental injury is covered by the Workers' Compensation Act (WCA).<sup>6</sup> The WCA is the exclusive remedy against an employer by an employee who suffers injuries because of bullying in the workplace, and private civil actions against employers for claims such as negligence or intentional infliction of emotional distress, are therefore not available.<sup>7</sup>

In *Jenson v. Employers Mut. Cas. Co.*,<sup>8</sup> a village clerk-treasurer brought a claim of intentional infliction of emotional distress against the village based on alleged abusive, bullying behavior by the village president. She alleged that his conduct caused her physical and mental disabilities that necessitated a six-week leave of absence. The Wisconsin Supreme Court found in favor of the village stating that the exclusivity requirement of the WCA applied, even in situations where the employee's injury is intentionally inflicted by a fellow employee. Thus, the remedies for injuries

caused by nonprotected class bullying are limited under Wisconsin law to the financial and medical benefits available under the WCA.

## Remedial and Preventative Measures

Considering the negative impact on a work environment and the liability and related costs, employers should commit to conducting an honest assessment of their work culture and eliminating problematic behavior.

## Investigations

Investigations are the primary tool used to detect and root out bullying and harassment. Prompt and thorough investigations have long been a legal requirement for employers presented with potential or alleged unlawful harassment in the workplace.<sup>9</sup>

Even though nonprotected class bullying is not illegal, it likely violates other organizational policies. Moreover, employers should, for the sake of their staff and the fact that bullying is bad for business, investigate any complaints, reports, rumors or other reasons to believe that someone is creating a toxic work culture. In addition, an investigation is often needed to ensure that the complained of behavior is not, in fact, unlawful harassment based on the victim's protected class status.

## Remedial Measures

Effective remedial measures will stop the bullying or harassment and improve the work environment. Further, an employer who takes prompt and effective action to address and further prevent bad behavior may have a defense to a claim of unlawful harassment under state and federal anti-discrimination laws.<sup>10</sup>

In determining what remedial measures to take, the question is whether the inappropriate behavior can be corrected and whether the remedial measures will stop the behavior from reoccurring. Perpetrators should agree, in writing, to the behavioral expectations moving forward and to cooperate with any help that will be provided, such as coaching, counseling, referral to an employee assistance program, or a performance improvement plan.

A refusal to agree, or any sign that the perpetrator has no intention of changing, will most likely necessitate termination of employment. Perpetrators who show no remorse, or who continue to blame the complainant and others, often cannot change the offensive behavior.

## Prevention

Prevention requires a commitment from officials to a zero-tolerance approach for bullying and harassment. A number of preventive measures are available to support the organization's efforts to be free of such behavior.

### *Implement meaningful policies.*

When officials are truly committed to development of a respectful workplace culture, they will have policies that adopt values around respect, civility, and professionalism. These policies must outline expectations of acceptable behavior and prohibited conduct, provide an effective complaint mechanism, and include processes for investigations, coaching, counseling, discipline, detection, and risk management.

### *Monitor the work environment.*

Workplace leaders who pay attention to the work environment and encourage staff to come forward when inappropriate behavior is occurring will find they are able to significantly reduce or eliminate bad behavior.

**Train managers.** Managers and supervisors who have moved up through the ranks and have never received leadership training often struggle with managing and monitoring their work environment. They also can be the perpetrators of bullying and harassing behavior. They must be trained in anti-harassment and anti-bullying, how to monitor for and address bad behavior in their departments, and how to have difficult conversations and manage staff conflicts.

**Train staff.** All staff should be trained in anti-bullying/harassment/discrimination, diversity and inclusion, managing biases, avoiding risk behaviors, and bystander awareness.

**Accountability.** Accountability is key to elimination and prevention. Conduct that is not tolerated will be reduced or eliminated because staff knows it will be swiftly and severely dealt with. On the other hand, espousing a desire for a respectful work culture while tolerating disrespectful and hurtful behavior will destroy trust and relationships at work.<sup>11</sup>

## Conclusion

Bullying and unlawful harassment create toxic work cultures. Employers who ignore or tolerate these behaviors do so at their peril and expense in the loss of key employees, turnover, retraining, insurance, and litigation costs. Using trained investigators skilled at workplace investigations is necessary to identify and eradicate bullying and unlawful harassment. Prevention of these behaviors starts at the top, and multiple measures should be used to assess potential risks and head off inappropriate behavior before it creates a toxic workplace and legal liability.

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1. Workplace Bullying Institute, *U.S. Workplace Bullying Survey* (2017); Hiscox, *Workplace Harassment Study* (2018).

2. As the Society for Human Resource Management (SHRM) found in a recent study, almost 20 percent of workers in the last five years have resigned due to toxic work cultures, and the associated costs to U.S. employers exceeded \$200 billion. SHRM, *The High Cost of a Toxic Workplace Culture: How Culture Impacts the Workforce—and the Bottom Line* (2019).

3. Workplace Bullying Institute, *The WBI Definition of Workplace Bullying* (last visited April 12, 2020).

4. *Robinson v. Perales*, 894 F.3d 818, 828 (7th Cir. 2018); U.S. EEOC, *Harassment* (last visited April 12, 2020).

5. Wisconsin Fair Employment Act, Wis. Stat. §§ 111.31-395.

6. Wis. Stat. Chapter 102.

7. Wis. Stat. § 102.03(2).

8. *Jenson v. Employers Mut. Cas. Co.*, 161 Wis. 2d 253, 468 N.W. 2d 1 (1991) (concluding that complained-of conduct did not constitute an "assault intended to cause bodily harm," which is an exception to WCA exclusivity provisions).

9. *Cerros v. Steel Tech. Inc.*, 398 F.3d 944, 954 (7th Cir. 2005).

10. *Swygar v. Fare Foods Corporation*, 911 F.3d 874 (7th Cir. 2018).

11. Judy Foley, *Retaliation at the Highest Level*, p.1 Navigate Transformation 2019.