Taking Workplace Diversity and Inclusion Efforts to Next Level

Presented by:

Section of Labor and Employment Law

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When Little Matters A Whole Lot

Wesley E. Profit, Ph.D., J.D.

A professor commends a young woman law student for a particularly insightful presentation of a complicated case. When class is over, several students approach her to voice their congratulations as well. One male student, after lauding her work, inquires innocently “But you’re not full black, are you?”

A Puerto Rican researcher and full professor at a school of public health has one of the largest grants in the country for the study of mental illness. He comes to work on a Sunday. As he is opening the door to his office, a junior faculty member, recently recruited, whose office is down the hall, mistakes the tenured professor for a janitor, and asks to have his office cleaned immediately.

An Afro-American doctor, chief of a department at a major teaching hospital, is doing rounds with the new interns. He walks into a patient’s room, entourage in tow. The patient, a middle-age white male, looks up and says in a jocular voice, “I didn’t send for the barber.”

How should the doctor respond? What should he say? If he doesn’t take the put-down as a joke, he is vulnerable to the claim that he is being too sensitive and that he is making a mountain out of a molehill. If he accepts the joke, is he not participating in his own diminution and dismissal? What if he were the patient’s surgeon where the efficacy of the patient’s belief in the skills of the doctor is an important element in the treatment process? What will the interns take away from this situation? Similarly, at the next faculty meeting, how does the clinical researcher
greet his young colleague? If the two law students are assigned to work together on a project, how will this incident titrate the relationship?

Micro-aggressions are small, subtle, easily-ignored-if-they-happen-once, offensive-as-opposed-to-defensive exchanges in which one person is made to feel unwanted, un-welcomed, unable, and unworthy. Frequently, the behavior dresses up as humor. Rarely is it something that is legally actionable. Sometimes the behavior is awful but unintended; at other times it is deliberate and calculated.

Always, the person who is the object of the behavior faces a difficult dilemma. What just happened? What did it mean? Is it something to which I should respond? Is it safe to do so? Do I care? Do I have the time? Would it be better for someone else to intervene?

These subtle offending behaviors happen frequently to people who are perceived as “out of place” or “unexpected” in the surroundings. It happens to women who are advancing in the world of business and commerce, particularly women who are advancing into places where they are rarely seen, or have not been seen before. Here one speaks of micro-inequities: small, stunning, examples of inequality that make more of biology and difference than needs to be or is true or accurate.

The project group consists of several men and its first woman member who was appointed project leader because of her past experience and skill sets. Traditionally, the group divides into two teams that compete against each other in a monthly night of bowling. When the new project member is introduced to this activity, there begins a vigorous discussion of whether the team she is not assigned to should have some kind of handicap in order to even the competition. The irony of the moment escapes comment.
At an important meeting chaired by the boss, the only woman in attendance advances an innovative idea. At the close of the meeting, the boss praises the idea but attributes it to one of the men. When this error is pointed out, the boss recovers by saying “it really doesn’t matter who came up with the idea. I hope no one is so sensitive as to be offended.”

A woman calls a repairman to do some work at her home. When the repairman finishes, he turns to her and says, “When your husband gets home, tell him that I replaced the filter in the air conditioning and he should plan on changing it about every six months.” The homeowner is single. Her significant other is not a man.

What is a woman to do in these situations? Is it important to point out the conspicuous male blind spots that have occurred? Will failure to do so make things more difficult? Or will doing so expose one to ridicule or, what may be worse, the label of being “overly sensitive” or lacking a sense of humor? Should one ever expect the offensive behavior to be corrected if it’s never pointed out as such?

Micro-aggressions and micro-inequities are easily ignored if they happen once. But they have great cumulative effect. When this behavior goes unchallenged and uncorrected, especially in the workplace, the person who is belittled must constantly mobilize against its likely re-occurrence. Living in a state of such hyper-mobilization and hyper-surveillance increases the wear and tear on the body and mind.

Mistakes result. The awful but unintentional is seen instead as deliberate and conscious. The reaction sounds with the history of past occasions and past silences. It explodes out of proportion to what just happened in the here and now. No one benefits from the resulting confusion.
Fortunately, in most situations, there is a solution. It requires courage and quickness and a sharp mind. And it comes from an unexpected place. Not the offender nor the offended but the bystander has the ability to intervene in ways that are truly helpful and productive. The bystander has clean hands. Thus the bystander can make an intervention that provides comfort to the offended and education to the offender without sacrificing either person’s dignity or face.

We are all bystanders, at times, to someone’s discomfort brought on by the great social illnesses of our day—racism and sexism and ageism and ability-ism to name a few. At the very least, we have all witnessed child-ism—the fairly automatic and unthinking feeling of superiority every adult has over every child that leads adults to exert control over the space, time, energy, and movement of any child who happens into their presence. Who has not heard someone say to a seemingly unattended child in a public place, “Go find your parents!”

Frequently, the key to being a good bystander is to ask the right question. The right question calls attention to the offending behavior without acrimony or blame. It may appear to have a kind of wonder-out-loud quality but it is a question whose answer leads inexorably to greater insight. For bystanders who take up this task, being able to ask the right question becomes a talent that improves with practice, experience, and reflection. In every situation, there is something that the bystander can do that will immediately provide hope to the offended while encouraging better future behavior on the part of the offender.

The City of Los Angeles settled a well publicized case in which an Afro-American fire fighter had been fed dog food while at work. What is most upsetting is not what “the Big Dog” was served, but that anyone, even in that context, could be so short-sighted, unthinking, and historically unaware, as to see the prank as funny. In an already tense workplace, hostility
frequently masquerades as humor. Ask any woman who was ever employed in a “traditionally male” environment.

As bystanders, we have a unique, important, and critical opportunity to make a difference. We build a better world when we choose to do something about the ways in which our fellow beings mistreat each other and are mistreated. Sadly, in the aforementioned examples, for want of a bystander’s timely intervention, opportunities were lost to improve the workplace for everyone!
FINALLY…FEDERAL EMPLOYMENT IS LOOKING GOOD!

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Introduction

President John F. Kennedy famously told us to “ask not what our country can do for us, but instead to ask what we can do for our country.” Many baby boomers took the President’s advice and sought low paying, highly satisfying positions in public service with organizations such as the Peace Corps, and in social advocacy jobs with President Lyndon B. Johnson’s “war on poverty.” Over the years, public service lost much of its appeal as the private sector created wealth for the entrepreneurial and technologically savvy Generation X. Until recently, the federal government had a very difficult time recruiting the best and brightest candidates. Lackluster recruiting has been attributed to “the feds” confusing hiring procedures, rigid salary structure, negative stereotypes of “bureaucrats” and top down management culture. Recruitment became particularly challenging when the federal government wanted to entice “millennials” into federal service. This generation of workers typically “works to live.” They do not “live to work.” Overall these workers are less likely to stay with the same employer for long periods and are more likely to demand a balance in their family and work life. But, things are rapidly changing.

As an employer, the federal government is having a renaissance! The federal level public service is experiencing a resurgence of its ability to attract talented, motivated, and technologically savvy individuals. With the economy in a slump, the resurgence is partly attributable to the lack of available private sector employment. A major reason for the resurgence however, has been due to the government’s use of promising initiatives which involve making reasonable time and place of work accommodations through alternative work schedules and telework options. These arrangements have been widely implemented by federal agencies and include part-time employment, job sharing, telework, alternative work schedules, (flexible and compressed), resource and referral services for child and elder care, and on-site or near-site child care centers. These options have given employees more control over their work schedules, and have reduced the stress and conflict caused by colliding work and home-life priorities. Oversight reports by the Office of Personnel Management (OPM) and the Government Services Administration (GSA) reflect the success of these initiatives, and suggest best practices that have established the federal government as a leader in improving diversity and inclusiveness.

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1 The views expressed in this article are the authors’ alone and do not represent those of the Library of Congress.
Because revolutionary thinking started in some agencies with long ago discussions of Workforce 2000, today the fortunes of public service employees are greatly improved and suddenly, federal employment is looking good! While stability and job satisfaction remain the top reasons that applicants seek a career with the federal government, a sluggish economy and other incentives are also having a positive impact on federal recruitment efforts. In the last decade, the federal government has narrowed the gap between many private sector and government salaries and improved job satisfaction with a number of creative 21st century initiatives designed to enhance the balance between family and work life, improve morale, increase productivity and simultaneously save energy and while reducing the nation’s carbon footprint.

This report examines the alternative work schedules that the federal government has offered to federal employees that have helped narrow that gap, reviews some of the challenges faced by managers, and the shares several of the resulting best practices.

**Alternative Work Schedules**

Federal agencies are authorized to establish alternative work schedules under Title 5 of the U.S. Code, Part III, Subpart E, Chapter 61, entitled, “Flexible and Compressed Work Schedules.” The purpose of the authorization is stated as, “The Congress finds that the use of flexible and compressed work schedules has the potential to improve productivity in the Federal Government and provide greater service to the public” (5 U.S.C. §6122). Alternative work schedules include:

1) Flexible Work Schedules

All full-time employees are required to work 80 hours during a bi-weekly pay period. The flexible work schedule includes designated hours (core hours) and days when an employee must be present for work. A flexible work schedule also includes designated hours during which an employee may elect to work in order to complete the employee’s basic (non-overtime) work requirement. For example, an employee working a flexible work schedule must work 8 hours, and has a flexible starting time of between the hours of 6:00 am and 9:30 pm.

2) Compressed Work Schedules

Under 5 U.S.C. 6121(5), a compressed work schedule means that an employee’s basic work requirement for each pay period is scheduled (by the agency) for less than 10 workdays. Unlike flexible work schedules, compressed work schedules are always fixed schedules. Another difference between flexible and compressed work schedules is that an employee on a flexible work schedule may be credited with a maximum of 8 hours towards the employee’s basic work requirement on a holiday or Sunday. The number of holiday or Sunday hours for an employee on a compressed work schedule however, is the...

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number of hours regularly scheduled for the employee to work on that day if not for the holiday.

3) Telework

The primary legislative mandate for telework was established in FY 2000 (§ 359 of Public Law 106-346). This law states that “[e]ach executive agency shall establish a policy under which eligible employees of the agency may participate in telecommuting to the maximum extent possible without diminished employee performance.” This law requires federal agencies to provide all eligible employees with the opportunity to telework at least one day per week. Each participating agency develops its own implementation criteria and standards for managing the program.

Challenges and Opportunities

While many managers and supervisors remain suspicious of alternative work schedules (AWS), they are widely available in most federal agencies. In contrast, requests for telework arrangements are regularly rejected. Telework is available in much more narrow circumstances. Federal telework is most often part-time rather than full-time. Agencies may, at their discretion, define and use the types of telework arrangements that best fit their business needs. In order to telework, the employee’s duties must be “portable.” In the past, agencies would stipulate that telework was not appropriate for the purpose of providing a child care arrangement. Today, however, telework is frequently an approved reasonable accommodation for employees with disabilities and its use is encouraged for dependent care.

1) Public Service is Family Friendly

Under Federal law, the OPM is required to make regular reports to Congress regarding “family-friendly” workplace arrangements. As stated above, these “arrangements” include part-time employment, job sharing, telework, alternative work schedules (flexible and compressed), resource and referral services for child and elder care, on-site or near-site child care centers. Some agencies also have programs to help facilitate the re-entry of workers who anticipate being out of the workforce for extended periods of time such as for the birth or adoption of a child, or other FMLA criteria. The findings of OPM’s reports are discussed below.

2) Managers and Supervisors are Key to Implementation

OPM reported that managers and supervisors were often prohibited from using such programs even when they would like to. These same managers and supervisors offered varying levels of support for their subordinates to participate. Many lower level supervisors discouraged employee participation even when their own managers were supportive. Success or failure is often attributed to the attitude of supervisors and managers toward family-friendly programs. OPM specifically found the following:
• Inconsistency in implementation (and openings for unfairness) was often due to flexible policies that allow managers substantial discretion to make decisions on family-friendly programs.

• The primary reasons provided by supervisors and managers for not implementing family-friendly programs are: concerns about office coverage, problems scheduling meetings, particularly on Mondays and Fridays, negative impacts on productivity, and the inability to monitor work.

• Telework requests are the most commonly denied of family-friendly options.

In response to the above findings, OPM made the following recommendations:

• Train supervisors and managers on beneficial impact of family-friendly programs on attracting and retaining quality employees.

• Show supervisors and managers how to use work planning and scheduling tools to assure productivity by employees using family-friendly benefits.

• Develop improved measurement and feedback on effectiveness of agency family-friendly programs.

• Encourage supervisors and managers to consistently apply family-friendly programs across offices and agencies.

• Support supervisors’ and managers’ use of family-friendly programs such as compressed work schedules and telework.

• Give supervisors and managers more flexibility to use alternative work schedules and telework themselves.

2009 OPM Telework Report

In August 2009, OPM issued its annual telework report for 2009. The report consisted of telework activity data submitted annually by Executive departments and agencies. OPM reported the following:

• 78 agencies reported a total of 102,900 out of 1,962,975 employees teleworking.

• 48 agencies (61%) reported an increase in their overall telework numbers.

• 78% of agencies provide formal notice of eligibility to their employees.

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• 35% track the number of telework requests that are denied; 33 cases were due to performance or conduct issues, 160 were due to type of work.

• Of the number of telework agreements that were terminated; 108 of these terminations were based on the employee’s decision, 31 were based on the supervisor’s decision due to a performance/conduct issue, and 78 were based on a supervisor’s decision due to a change in work assignments.

• 27 agencies reported cost savings/benefits as a result of telework; of these, the greatest benefit was to morale (24 agencies), then productivity/performance and transportation (22 each), then human capital (21).

• In terms of major barriers to telework, office coverage was highest (48 agencies), followed by management resistance (38), organizational culture (36), and IT security and IT funding (both at 25).

• To overcome these barriers, 42 agencies are offering training for managers, 35 are offering training for employees, 29 have increased marketing, and 21 have established or increased budget for IT expenditures.

Effect of Telework on Dependent Care

In 2006, the GSA issued a report of the results of a series of surveys which reviewed the effect of teleworking on dependent care issues affecting workers.\(^4\) Overall, the results of the report showed that telework can effectively assist employees with their dependent care situations, mainly by;

1. providing flexibility in employees’ daily schedules;
2. eliminating long commutes; and,
3. enabling employees to be more available to their dependents.

The report stated:

A standard practice among most employers, including federal agencies, is to place significant restrictions on the use of telework for dependent care (e.g., children, elders, disabled relatives) purposes. Such restrictions, however, may be becoming untenable as increasing number of employees find themselves in care giving roles, having to balance job duties with dependent care responsibilities. Moreover, due to the dearth of studies exploring the relationship between telework and dependent care, these restrictions are not based on sound policy and practice supported by empirical evidence.

A majority of those surveyed by GSA reported that telework benefited them as well as their dependents, who were both healthier and happier. They also reported to GSA that telework benefitted their organizations in that teleworking reduced turnover and improved job performance. GSA believed that the results suggested that the standard practice of prohibiting teleworking for dependent care purposes may not be the best practice. To test the strength of the results of the surveys results, GSA compared the results from the 2005 study with those from the 2003 study. The comparison found that the results from the two studies were consistent, and thus further substantiated the findings. GSA considered the following from the respective studies:

- 25% of working mothers expressed dissatisfaction with their work/life balance and were actively seeking jobs with more flexibility.

- 38% indicated they had missed at least two significant events in their children's lives in the last year due to work.

- 10% percent indicated missing more than five such events.

- 26% indicated that their jobs were negatively impacting their relationships with their children.

- 52% of the respondents indicated a willingness to take a pay cut to spend more time with their children; this was an increase of 38% over the previous year.

- A labor market study, for the period from 1969 to 1996, by the U.S. Council of Economic Advisers (1999) reported that due to increased work hours, there was a 14% decrease (22 hours/week) in parental time available for children and that “the time crunch falls heavily on employed women who spend over one third less time on child care and household tasks than women without paid jobs, but still have 25 to 30 percent less free time.”

**GSA Recommendations**

GSA recommended, and most agencies have implemented, initiatives to visibly and affirmatively support telework through:

- Clarification of the appropriate role that telework can play in balancing work and dependent care;

- Top down support to dispel the anxiety and sensitivity associated with the proper use of telework as a dependent care solution;

- Top down support to help managers and policy makers accept and promote the work-life balance (work and dependent care) potential of telework; and,

- Promotion of the consequent benefit to the agency as well as to the teleworker and dependents of teleworkers.
Conclusion

Timing is key to almost everything done in life. The 21st century seems to be perfect timing for federal employment. There is a growing trend over the last few years of federal agencies embracing telework and other human resource flexibilities as a way of responding to potential “brain drain” as Baby Boomers prepare to retire. While human resource flexibilities may have started as recruitment tools, time has demonstrated that they also help to reduce traffic, lower peak time energy use, and serve as a way to ensure the continuity of operations in the event of terrorist or weather related emergencies. Who could have known meager agency discussions two decades ago about what it takes to compete with private enterprise would morph into a new paradigm of human resource pilots, experimentation, and flexibility? The federal workplace is no longer a cold bureaucracy of not-so-caring, poorly compensated worker bees. Diversity and inclusion are federal values with a long history. They contribute mightily to why smart, ambitious, college educated, tech savvy Millennials are seeking public service careers.

Organizations that seriously embrace diversity and intend to reach the next level of inclusion will reap competitive advantage by attracting and retaining high-quality, high-performing employees. Taking diversity initiatives to the next level necessarily includes strong business imperatives. As an example, telework is a measurable strategy for reaching diverse employees and ensuring their inclusion once on board. But telework has other business objectives, as previously discussed. In many respects, telework and related human resource flexibilities are “neutral”...they work both inside and outside diversity of initiatives. Both public agencies and private corporations will benefit from having employees that are less stressed, more energized, and more committed to their jobs when diversity and inclusion evidence 21st century thinking. Although the public service is currently experiencing an “abundance of riches” due to the confluence of a public service renaissance and a faltering national economy, the federal government must continue to show leadership and foster an environment for private sector employers to increase diversity and inclusion efforts. Federal leadership in this area should persist even when the availability of private sector employment increases. To build on the promise of diversity and inclusion, the federal government should serve as a role model. Today, any organization that doesn’t have a robust strategy for getting to the next level is guaranteed to lose ground and fail to achieve its diversity goals.
Workplace Flexibility in Corporate America

Ann Haley Fromholz
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What is workplace flexibility?

• Recognizes diversity: lifestyles, life demands, people, work styles

• Different definition of when and where work gets done

• Measures results, not hours
What is workplace flexibility?

• Ad Hoc Flexibility: Determined by managers

• Structured Flexibility: Arrangements under policy, rule, or guidelines

• Pure Flexibility: Results-based. No defined schedule or location
Types of Flexible Work Arrangements

- Alternate Workweek (aka Compressed Workweek): full time schedule in fewer than 5 days a week or 10 days in 2 weeks
- Flexible Schedule (aka Flextime): varying start and end time of standard day
- Telecommuting (aka Telework): working from an alternate location
- Job Sharing: two people sharing duties and hours of one position
- Part-Time Employment: Less than a full-time schedule with reduction in pay/benefits
Industries Surveyed

- Automotive
- Business Services
- Consumer Goods
- Education
- Energy
- Health Care

- Health Care Products
- Retail
- Technology
- Transportation
- Telecom
- Utility
Telecommuting/Telework

• Offered by 74% of the companies surveyed
  – All technology companies surveyed have telework program
• Just over 50% have a telework policy
• Often is subject to manager discretion: job eligible for telework where it may effectively be performed from home
• Many companies require employee to sign telecommuting agreement
• Typically only exempt employees are eligible
• Must be good performers
• Company may or will evaluate employee’s proposed remote setup
  – Lockable office
  – Reliable internet
• Company tracks hours or work deliverables
Flexible Work Schedules

• 84% of companies surveyed offer/allow some kind of flexible work schedule
  – Employee’s choice of start/end times, so long as she works certain number of hours per day
  – 9/80 schedule is fairly common

• Again, tech companies lead the way. All surveyed permit flexible work schedules.
Flexible Work Schedules

• Flexible work schedule as accommodation to a disability
  – Companies who do not otherwise offer flexible work schedules to employees may be required to allow an employee to have a flexible schedule to accommodate a disability
  – Companies surveyed explicitly consider this as part of interactive process
Doing it Right

• Evaluate whether business will allow for flexible work arrangements
  – Which jobs might be done effectively from elsewhere?
• Document how the programs will work
  – Policy or guidelines
  – What are prerequisites for employees (i.e. performance)
  – Who will monitor/track employee’s work? How?
Doing it Right

• Training and Support
  – Training and support is a key component of successful programs, according to companies surveyed
  – Train managers to administer workplace flexibility programs consistently and appropriately
  – Support from HR
  – Legal guidance if flexible schedule or telework is an accommodation
The End
Workplace Bullying

*Wilentz, Goldman & Spitzer, P.A.*
*By: Maureen Binetti, Esq.*
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I. Introduction

The United States has had laws prohibiting discrimination and harassment on the basis of protected categories for several decades. However, increasingly more attention is being paid to forms of behavior that may be harmful to employees but that may not be based on any protected category.

In September 2007, a comprehensive survey was concluded which indicated that 37% (54 million people) of the American workforce has been bullied, and another 12 percent have witnessed bullying. Thus, a total of 71 million workers have been affected by bullying.¹ That same poll indicated that employers react to reports of bullying 44% of the time by doing nothing; they make the situation worse 18% of the time.² While debate will rage over the definition of “bullying”, which can range from mild sarcasm to physically abusive behavior in the workplace, bills which would give victims of workplace bullying redress even if not based on a protected category have not yet been adopted into law. Therefore, employees must rely upon existing common law and statutory remedies in order to obtain legal redress for such harm.

II. Current Remedies

Every state in the United States has workers’ compensation legislation designed to cover injuries to employees in the workplace. Additionally, there are statutory and common law remedies for intentional infliction of emotion distress, assault, battery and tortious interference. Indeed,

¹ Workplace Bullying Institute – Zogby International 2007 U.S. Workplace Bullying Survey.
² Id.
employees variously have attempted to employ tortious interference, intentional infliction of emotional distress, and other similar common law claims. However, a recent case amply demonstrates the difficulties encountered in attempting to bring such claims, where the harassing workplace conduct cannot be shown to be based upon a protected characteristic (such as sex, age, race, etc.), pursuant to anti-discrimination laws. In *Frye v. St. Thomas Health Services*, 227 S.W. 3d 595 (Tenn. Ct. App. 2007), the Court upheld the lower court’s grant of summary judgment in favor of defendant, holding that no matter how disagreeable an “equal opportunity oppressor’s” style may have been, so long as she treated all employees “oppressively,” her conduct did not violate the Tennessee Human Rights Act (“THRA”). Citing cases that expound the view that Title VII should not become a “general civility code,” the *Frye* Court stated:

The THRA only protects qualified individuals against the hostile work environment if the environment is discriminatory. Nothing in the record established that [the supervisor] treated age-protected employees any differently than non-protected employees, rather, the testimony clearly showed that [the supervisor] was an equal opportunity oppressor, using her intense, dominant, abrupt, rude, and hard-nosed management style on all St. Thomas employees. Disagreement with the management style alone without evidence of a discriminatory intent or motive, no matter how disagreeable that style may be, is insufficient to warrant protection under the THRA.

*Id.* at 609.

The contortions employed to avoid such a decision may result in difficult (and often artificial) distinctions under Title VII and related state statutes, by which plaintiffs attempt to argue that the “bullying” of a protected class versus a lesser degree of bullying toward, or a lesser effect upon, unprotected employees may sustain a claim. For example, in *EEOC v. N.E.A.*, 422 F. 3d 840 (9th Cir. 2005), a sexual harassment case, the Court utilized its prior holdings, which employed the reasonable woman (or reasonable man) standard (as does the New Jersey Supreme Court), explaining that, for example, women may react more strongly to various types of harassment than
men.  Id. at 845. The Court further relied upon its prior pronouncements that the mere fact that some men also were harassed does not automatically defeat a showing of differential treatment, as there may be varying degrees of harassment. Id. at 846. (citations omitted). Thus, the Court held that there was at least a debatable question as to objective differences in treatment of male and female employees, as well as differences in subjective effects upon men and women, sufficient to defeat summary judgment. Id. Likewise, in EEOC v. Nat’l Educ. Ass’n, 422 F.3d 840 (9th Cir. 2005), the Ninth Circuit determined that “offensive conduct that is not facially sex-specific nonetheless may violate Title VII if there is sufficient circumstantial evidence of qualitative and quantitative differences in the harassment suffered by female and male employees.” Id. at 842.

Similarly, in Zalewski v. Overlook Hosp., 300 N.J. Super. 202 (Law Div. 1996), the New Jersey Law Division interpreted the New Jersey Law Against Discrimination (“NJLAD”) expansively to apply to harassment based upon “gender stereotyping.” In Zalewski, plaintiff’s co-workers never suggested that plaintiff’s sexual orientation was anything other than heterosexual nor was there any evidence that plaintiff was actually homosexual or bisexual. Id. at 204. Rather, the court relied on evidence indicating that plaintiff was called slang terms such as “‘whack’o,’ ‘jerk-off,’ and ‘3-5, 3-5,’ . . . [and evidence that his] co-workers also placed pictures with captions on plaintiff’s desk and in his locker which made reference to plaintiff’s lack of sexual relations with women,” to determine that plaintiff was perceived to be a virgin and effeminate. Id. at 203-204. Thus, the Zalewski court denied defendant’s motion to dismiss because there was evidence that plaintiff was harassed because he was “perceived . . . to be less than someone’s definition of masculine.” Id. at 211.

On the other hand, courts generally do not apply this type of lenient analysis under discrimination statutes. For example, in Yanowitz v. L’Oreal USA, Inc., 36 Cal. 4th 1028 (Cal.
2005), the California Supreme Court held that “a mere offensive utterance or even a pattern of social slights by either the employer or co-employees cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment.” Id. at 1054. Likewise, in McRae v. Dep. of Corrections & Rehabilitation, 142 Cal. App. 4th 377 (Ct. App. 2006), the court noted that “[i]f every minor change in working conditions or trivial action were a materially adverse action then any action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit.” Id. at 386 (internal quotations omitted).

Therefore, employees generally must resort to claims under the common law. For example, in Subbe-Hirt v. Baccigalupi, 94 F.3d 111 (3rd Cir. 1996), the plaintiff asserted an intentional infliction of emotional distress claim against her supervisor, who had singled her (and other employees) out for torment. In that case, the supervisor repeatedly delighted in bringing plaintiff and other employees into his office for “root canal,” by which, on a virtually daily basis, he abused employees in an attempt to force them to quit. Moreover, after plaintiff submitted doctor’s notes specifically stating that she should not be subjected to stress, the individual supervisor intentionally targeted her weakness in this regard. Id. at 114-115. In that case, the Third Circuit upheld the claim for intentional infliction of emotional distress.

In most cases, however, such claims fail, as the elements of such a claim are much more difficult than for a hostile environment claim based upon a protected characteristic. The conduct not only must be shown to be extreme and outrageous, but the plaintiff must show that he or she suffered severe emotional distress (normally by undergoing treatment and/or demonstrating physical symptoms). Thus, many workplace situations which would state a claim under discrimination statutes, which do not require the conduct to be extreme and outrageous, and presume some degree of emotional distress is caused by discrimination, would fail to state a claim under the common law.
Finally, an attempt has been made (with some success) to (indirectly) assert a workplace bullying claim. In Raess v. Doescher, 883 N.E.2d 790 (Ind. 2008), the Indiana Supreme Court affirmed a verdict in favor of the plaintiff where the claims brought were assault and intentional infliction of emotional distress, but where expert testimony was presented, and numerous comments made by plaintiff’s attorney in opening and closing, as to the fact that the individual supervisor was a “workplace bully” and that the case was about “workplace bullying.” The Raess case involved a confrontation between the plaintiff and his supervisor, a doctor, who purportedly led the plaintiff to believe that he was going to physically assault him, resulting in severe emotional distress and physical symptoms to the plaintiff. The Indiana Supreme Court held that “[in] determining whether the defendant assaulted the plaintiff or committed intentional infliction of emotional distress, . . . [t]he phrase ‘workplace bullying,’ like other general terms used to characterize a person’s behavior, is an entirely appropriate consideration.” Id. at 799. In fact, the Court noted that “workplace bullying could be considered a form of intentional infliction of emotional distress.” Id. (internal quotations omitted).

III. Proposed Legislation

Workplace bullying legislation has been introduced in thirteen states over the past few years. Although it has not yet passed in any, bills currently are active in Vermont, New Jersey and New York. In fact, on May 12, 2010, the New York State Senate passed a bill that would establish a private cause of action for an abusive work environment. The New York bill is currently active in a

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3 It should be noted that the expert in that case was Gary Namie, who co-founded and directs the non-profit research and education organization, the Workplace Bullying Institute. The Workplace Bullying Institute is the primary organization behind most of the efforts in the United States to introduce workplace bullying legislation. Substantial information on the workplace bullying issue is available at its website at workplacebullyinglaw.org.

4 The Indiana Supreme Court procedurally barred the defendant’s claims that the expert testimony was inadmissible under Rule 702 and that the expert’s referring to the defendant as a “workplace bully” was inherently prejudicial because these grounds were not raised during trial. Id. at 797.
New York State Assembly Committee. The proposed bills have variations, although the model for most is the “Healthy Workplace Act.”

A review of the Vermont, New Jersey and New York bills demonstrates three such variations. The Vermont bill provides that it shall be an unlawful employment practice to subject an employee to an abusive work environment. Abusive conduct is defined as “actions or omissions of actions by an employer or employee in the workplace that are malicious and that a reasonable person would find hostile, offensive, and unrelated to the employer’s legitimate business.” The definition includes “gratuitous sabotage, or undermining of the employee’s work performance, repeated physical conduct, or verbal abuse such as derogatory remarks, insults, or epitaphs that a reasonable person would find threatening, intimidating or humiliating.” “Malice” is also defined.

In contrast, the New Jersey bill, the “Healthy Workplace Act,” defines “abusive conduct” in the same manner, but specifically provides for a penalty of not more than $25,000.00 for a violation. It also provides (unlike the Vermont bill) that it shall be an affirmative defense to such claims that the “employer exercised reasonable care to prevent and properly correct abusive conduct and the aggrieved employee failed to take advantage of appropriate preventative and corrective opportunities provided by the employer.” Finally, it states that the remedies provided therein shall be in addition to remedies provided under worker’s compensations laws, provided that, if an employee elects to receive worker’s compensation, he or she shall not be permitted to recover damages through a separate legal action under the Act.

The New York bill, is very similar to the New Jersey bill in that it defines “abusive conduct” in the same manner, provides for an affirmative defense that the employer exercised reasonable care to prevent and promptly correct the abusive conduct, and caps damages for emotional distress at $25,000.00. However, under the New York bill, if abusive conduct culminates in a negative
employment decision, the employer’s affirmative defense will no longer be available and damages for emotional distress shall not be limited.

IV. Conclusion

It can be argued that workplace bullying laws essentially regulate “civility” in the workplace and open the floodgates to litigation. Additionally, attempts to legislate workplace conduct could have the effect of stifling the ability of managers to manage, for fear that anything they say or do could be construed as unlawful bullying. In contrast, it could also be argued that absent such legislation, the majority of employers and their employees will not voluntarily alter their behavior. Moreover, workplace bullying laws could give employers an incentive to enact policies and provide proper training for employees, resulting in an affirmative defense to “bullying” claims, the ultimate goal of all such remedial legislation -- which is to prevent such conduct from occurring in the first instance. Thus, it is clear that the employer and employee sides of the debate as to recourse by employees for workplace bullying will rage hotly.⁵

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⁵ It should be noted that numerous articles have been written on this subject, most of which can be located by accessing the workplace bullying website set forth above. In addition, several books have been written on this issue, including The No Asshole Rule by Robert Sutton, Professor of Management Science and Engineering at Stanford University. Many of the books and articles on this subject have been written by non-lawyers, including human relations experts and others who argue the benefits to employers, aside from legal liability, in preventing and remediating the conduct of the “equal opportunity oppressor.” These benefits include increased employee morale, lower rates of absenteeism and illness of employees, and, quite simply, the fostering of “civility” in the workplace because it is the right thing to do.