Workplace Bullying from a Plaintiff’s Perspective

By Sue Ellen Eisenberg and Hideaki Sano

Fighting bullying in a world full of bullies.

A recent cover to Parenting magazine’s February 2012 issue trumpeted the following headline: “Raise the Next Steve Jobs (or at least a really, really bright kid).” In the context of workplace bullying, the headline was noteworthy in several respects. For one, parental aspirations of raising well-socialized, respectful and kind children (or even “bright” children) has apparently been replaced by a mandate to raise “really, really bright kid[s].” More to the point, parenting magazines are now suggesting that parents model their children after a notorious workplace bully. A January 2009 Forbes article

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stated that Steve Jobs was known for his “iron-fisted management style,” and was “accused of making his subordinates cry and [of] firing employees arbitrarily.” (Nicole Periroth, In Pictures: Bully Bosses Hall of Fame, Forbes.com (Jan. 2009) (http://www.forbes.com/2009/01/27/bully-bosses-ceos-business-power08_0127_bullies_slide_5.html).) His bullying was deemed forgivable and almost revered because it was “‘balanced by his famous charisma.’” *(Id.)* Which, of course, begs the question: How do employees combat bullying in a world that is *trying* to raise the next Steve Jobs?

A good place to begin is a discussion of what conduct constitutes bullying. So what is bullying? As with most behavioral definitions, opinions vary. For example:

- Webster’s Dictionary ironically defines “bully” with the archaic positive meaning of “a good fellow” or “fine chap” before eventually moving on to the pejorative modern definition of “one given to hectoring, browbeating and threatening; esp: one habitually threatening, harsh, or cruel to others weaker or smaller than himself.” (Webster’s Third New International Dictionary (unabridged) at 295 (1993).)

- Wikipedia – something of a barometer of current cultural understanding - defines workplace bullying as the “tendency of individuals or groups to use persistent aggressive or unreasonable behavior against a co-worker or subordinate” with the “majority of cases reported as having been perpetrated by management.” (Wikipedia, Workplace bullying, http://en.wikipedia.org/wiki/Workplace_bullying (Feb. 14, 2012).)

- One government agency has defined workplace bullying as “repeated, unreasonable actions of individuals (or a group) directed towards an employee (or a group of employees), which are intended to intimidate, degrade, humiliate, or undermine; or which create a risk to the health or safety of the employee(s).” (Washington State Dept. of Labor & Indus., Workplace Bullying and Disruptive Behavior: What Everyone Needs to Know Rpt. # 87-2-2011 (April 2011).) The agency further noted that “[w]orkplace bullying often involves an abuse or misuse of power.” *(Id.)*

- A commonly cited scholarly definition developed in the school bullying context includes repeated aggressive and negative behavior and an imbalance of power. (Dan Olweus, Bullying at School: What We Know and What We Can Do) (1993).)

These definitions vary slightly in their specifics, but generally involve several common elements: 1) negative commentary or behavior; 2) continuing and repeating over time; and 3) between or among individuals where there is an imbalance in power or strength. These common elements of bullying make sense in the abstract, and are consistent with a layperson’s concept of a bully. But in attempting to apply these elements to conduct and relationships in the work environment, one becomes immediately aware of several issues.
The challenge of applying the concept of bullying to the workplace.

Interestingly, when the concept of bullying is applied to the workplace environment, several things become immediately apparent. First and foremost, the concept of bullying is inherently difficult to apply in a workplace environment. This is mainly due to the fact that the elements of bullying defined above are key components of most supervisor-subordinate relationships in the workplace. Supervisors regularly provide feedback, including negative feedback, to their subordinates. Supervisors will often be forced to provide negative feedback repeatedly and over the course of time, particularly in the case of average or poor performers. The supervisor-subordinate relationship inevitably involves an imbalance in power. Thus, in some (albeit extreme) sense, supervisors likely regularly and unthinkingly engage in conduct that can be perceived as bullying by subordinates.

Beyond these inherent relational issues are equally pervasive cultural issues. For example, the myth of the “good,” abusive boss has long been a part of American workplace folklore. Thus, for every Ebenezer Scrooge (Charles Dickens, A Christmas Carol) or Montgomery Burns (the Simpson) who is excoriated and punished for being a bully, there is a Perry White (Superman) or Michael Scott (the Office) who yells and abuses his way into the hearts of his adoring employees. Indeed, real world examples of the “good” bullying boss abound. The previously discussed Steve Jobs is but one of many legendary bullies of the corporate world, individuals often portrayed as misunderstood and demanding geniuses who eventually secure their own television shows (can you say “You’re fired!!”) and product lines (“Martha Stewart Everyday”).

Finally, as with any relational issue, the context and the individuals involved are critical to interpreting conduct. Businesses have distinctly different cultures that often play a large role in defining what is considered normal feedback or commentary, and what steps over the line into harassment and bullying. Even the identity of the speaker and the recipient are critical factors in determining whether conduct constitutes bullying. Thus, while somewhat dour U.S. Ambassador John Bolton’s “temper and treatment of staff aides” was often mentioned during his failed attempt to be confirmed in 2006 (Trish Turner & the AP, No Plan for Bolton Confirmation in Senate, FoxNews.com (Nov. 10, 2006) (http://www.foxnews.com/story/0,2933,228498,00.html)), Justice Elena Kagan’s “temper” – which she would not hesitate to show and which was sometimes accompanied by “blisteringly frank language” has been largely ignored, largely because of her overall intellect, good nature, and affability. (Nancy Benac, Kagan’s life an undeviating course to high court, MSNBC.Com (6/27/10) (http://www.msnbc.msn.com/id/37959702/ns/politics/t/kagans-life-undeviating-course-high-court/).

Judicial reluctance to take on the issue of bullying in the workplace.

Given the complexities of workplace bullying, and the general deference of courts to business decisions and judgments, the reluctance of courts to take on the issue of workplace bullying with appropriate urgency is not completely surprising. The Second
Circuit, for example, emphasized the cautious approach that courts should take with “hostile work environment cases” to ensure their “linkage or correlation to the claimed ground of discrimination,” because to do otherwise would be to convert federal courts into “court[s] of personnel appeals.” (Alfano v. Costello, 294 F.3d 365, 377 (2d Cir. 2001).)

Numerous articles have reviewed and analyzed failed efforts by employees to use traditional tort remedies or status-based causes of action in situations of gender-neutral harassment. (See, e.g., David C. Yamada The Phenomenon of ‘Workplace Bullying’ and the Need for Status-Blind Hostile Work Environment Protection, 88 Geo. L.J. 475, 491-523 (Mar. 2000).) Employees have brought claims for intentional infliction of emotional distress, negligent infliction of emotional distress, status based discrimination and harassment under state law or Title VII, civil assault, civil battery, and whistleblowing. Other employees have brought claims under less common torts, including for defamation, or tortious interference with contract or prospective business relationship.

Notably, this is not simply true of cases in which plaintiff’s allegations of bullying might be viewed with some skepticism. Indeed, a case that our firm recently filed exemplifies how extreme workplace bullying can be, without being considered actionable under a traditional tort remedy. In that case our client was the victim of extreme bullying conduct by a male supervisor. He would constantly threaten to fire her and constantly harass her. He would even repeatedly call her on her cell phone while she was in the restroom.

At the same time, there was no colorable status-related harassment claim because her supervisor treated all of his subordinates in this same manner. Moreover, our client could not demonstrate an adverse employment action because her supervisor reviewed her positively and our client was promoted and received raises. Indeed, the company itself found the events unremarkable because from a cultural perspective, her supervisor’s conduct was not that unusual.

Our client only decided to pursue litigation because the bullying forced her out of the workplace on a stress-induced leave that was so severe that she developed physical symptoms, including facial lesions. Even so, a Michigan circuit court recently held that – despite the constant verbal threats, harassment and bullying – Ms. Stocki could not state a claim for intentional infliction of emotional distress, and ultimately dismissed her case.

By contrast, those cases in which bullying conduct has been found to support viable claims inevitably involve some conduct that can be reclassified as separately tortious conduct. The often-cited Indiana Supreme Court decision is Raess v. Doescher is illustrative. Plaintiff, an operating room perfusionist (the individual charged with overseeing the heart/lung machine), sued Dr. Daniel Raess, a cardiovascular surgeon that had bullied her, for assault, intentional infliction of emotional distress, and tortious interference with employment. (Raess v. Doescher, 883 N.E.2d 790, 793 (Ind. 2008).) The two had a verbal altercation in which Dr. Raess had “aggressively and rapidly advanced on the plaintiff with clenched fists, piercing eyes, beet-red face, popping veins, and screaming and swearing at him.” (Id. at 794.) The trial court permitted plaintiff to
introduce expert testimony characterizing Dr. Raess as a “workplace bully,” a ruling that the Indiana Supreme Court could not review because defendant did not preserve his objection. (Id. at 796-97.) The Indiana Supreme Court did find that the concept of a “workplace bully” was relevant to plaintiff’s claims and found no abuse of discretion in the trial court’s refusal to provide an instruction limiting the jury’s consideration of whether Dr. Raess was a “workplace bully.” (Id. at 799-99.)

Ultimately, however, what enabled plaintiff to state a viable claim was the fact that Dr. Raess’s conduct separately constituted an assault. (Id. at 794.) Plaintiff’s conduct had created reasonable apprehension by plaintiff that Dr. Raess was “going to hit him,” a fact that turned Dr. Raess’s bullying into an assault. (Id.)

A similar “plus” factor existed in Thompson v. Tracor Flight Sys., Inc., a bullying case filed in California. There, the California Court of Appeal upheld the jury’s determination that defendant’s bullying resulted in plaintiff’s constructive discharge even though it was status neutral. The key circumstance in Thompson, however, was the retaliatory nature of the bullying – i.e., that it was done in response to plaintiff’s opposition to defendant’s discriminatory practices. (Thompson v. Tracor Flight Sys., Inc., 86 Ca. App. 4th 1156, 1165; 104 Cal. Rptr. 2d 95 (2001).)

Thus, although such cases perhaps reflect the increased receptiveness of courts to claims of workplace bullying, the change is slight at best. Rather than treating bullying itself as actionable, the cases still attempt to reclassify the bullying as conduct otherwise actionable under existing tort theories. In this regard, it is interesting to note that even the jury in the Raess case held that the bullying was not sufficient to constitute intentional infliction of emotional distress. Still, the recognition of the trial court and the Indiana Supreme Court in Raess of the relevance of workplace bullying (and expert testimony regarding this subject) to a claim for assault or intentional infliction of emotional distress reflects increased recognition of workplace bullying as a distinct form of misconduct.

The future of workplace bullying.

Given the general reluctance of courts to adjudicate workplace bullying through existing tort remedies, there has been increased focus on passing legislation specifically targeting workplace bullying. Such efforts have been well-documented. (See, e.g., Carol R. Gibbons et al., Don’t Get Pushed Around, ACC Docket at 87-90 (Apr. 2010).) And while anti-bullying legislation has been adopted in response to school bullying – indeed, as of 2011, forty-seven of the fifty states (all except Michigan, Montana and South Dakota) had passed school anti-bullying legislation (Victoria Stuart-Cassel et. al., Analysis of State Bullying Laws & Policies App. B (submitted U.S. Dept. Ed. 2011), no state has passed anti-bullying legislation focused on the workplace. (See, e.g., Kate Rogers, New Bill Targets Workplace Bullying, FoxBusiness Online Ed (July 12, 2011).)

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2 Since that report was issued, Michigan passed a school anti-bullying law in December of 2011. (See MCL 380.1310b.)
Despite the lack of success domestically, such legislative efforts have been fruitful abroad. A number of foreign countries have passed workplace bullying laws, including Sweden, Canada, the Netherlands, and Turkey. At a minimum, in an increasingly multi-national business climate, such international laws prohibiting bullying provide a potential source of rights for employees working for companies based in or doing business in those countries.

Interestingly, separate factors are causing businesses to focus on workplace bullying. Workplace violence, for example, has been a growing concern for the business community, and has been of greater focus given the current economic conditions. (Ross Arrowsmith, *Stress of Weak Economy May Increase Workplace Violence*, Workplace Violence News (Nov. 30, 2008.) Given the linkage between workplace violence and workplace bullying, the business community is also starting to focus on workplace bullying. (See, e.g., Susanne Sclafane, *What Employers Should Do About Workplace Bullying*, Property Casualty 360 (Apr. 1, 2011).) Notably, OSHA has defined workplace violence to include “threats and verbal abuse,” not simply physical violence for some time. (U.S. Dept. Labor Occupational Safety & Health Admin., *Workplace Violence* informational fact sheet (2002).)

Even beyond its linkage with workplace violence, there is growing recognition of the business costs of workplace bullying itself. More and more studies and surveys reveal the prevalence of bullying and its economic impact, and businesses are starting to pay attention. One recent survey, for example, found that 35 percent of the workforce – over 53 million workers – claimed to have been the victim of bullying. (Workplace Bullying Institute, 2010 U.S. Workplace Bullying Survey.) 58 percent of those claiming to have been bullied were women. (Id.) In fact, bullying is four times more prevalent than illegal harassment. (Workplace Bullying Institute, 2007 U.S. Workplace Bullying Survey.)

The negative ripple effects of such bullying on the bottom-line of businesses have been equally eye opening. A 2002 Orlando Business Journal article, for example, cited a bullying survey of 9,000 federal employees that estimated a cost of more than $180 million from bullying due to lost time and productivity alone. (Liz Farrell, *Workplace bullying’s high cost: $180 M in lost time, productivity*, Orlando Business Journal (March 2002).) These costs stem from secondary effects of bullying such as lost productivity, worker turnover, low morale, increased absenteeism and medical and worker’s compensation claims, and increased legal expense. (Washington State Dept. of Labor & Indus., *Workplace Bullying and Disruptive Behavior: What Everyone Needs to Know* Rpt. # 87-2-2011 (April 2011); Catherine Mattice, *The Cost of Workplace Bullying*, *www.NoWorkplaceBullies.com* (July 2009); Charlotte Rayner and Loraleigh Keashly, *Bullying at work: A perspective from Britain and North America, Counterproductive Workplace Behavior* 271-296 (2004) (Fox, S. and Spector, P. (Eds.).) Obviously, from a business perspective, such facts and numbers become difficult to ignore, and as a result, employers are beginning to implement bullying policies out of economic self-interest. Moreover, pressure from insurers regarding the escalating costs associated with bullying is spurring businesses to develop and implement robust anti-bullying policies. (Mike Tsikoudakis, Web Exclusive: Stay mindful of cyber bullying in the workplace, Business
Practical advice for employees facing workplace bullying.

Given the legal landscape, what should an employee who is being bullied do?

For one, become active and informed. Document and record instances of bullying. Create a log of bullying events, save voicemails and print e-mails. Review your employment policies and other policies. Depending on the circumstances, speak to your human resources department. If the situation is serious enough, consult an attorney.

The importance of consulting an attorney cannot be overemphasized given the changing legal landscape related to bullying. Women and minorities, for example, may be able to brings claims – under the proper circumstances - for what otherwise appears to be gender-neutral bullying. In EEOC v. National Educ. Ass’n, Alaska, for example, the Ninth Circuit overturned the trial court’s grant of summary judgment even though the conduct of plaintiff’s supervisor was “not, on its face, sex- or gender-related” and even though plaintiff’s supervisor lacked the intent to drive women out of the workforce. (EEOC v. National Educ. Ass’n, Alaska, 422 F.2d 840, 844-45 (9th Cir. 2005).) Rather, the Ninth Circuit stressed that plaintiff could state actionable claims, regardless of these facts, if she could adduce evidence that the bullying “differed sufficiently in quality and quantity” based on a protected classification. (Id. at 844.) Thus, despite the general reluctance of courts to adjudicate claims of workplace bullying, employees may be able to seek and obtain relief through the courts given the proper fact pattern.

Moreover, given changing societal values and the evolving perception of workplace bullying, employees may soon find courts more open to litigating workplace bullying claims through traditional tort remedies. The passage of anti-bullying and anti-hazing laws reflect growing societal disapproval of bullying, the likely result of increased understanding of the anti-social and destructive nature of bullying. This change may eventually permit employees to redress bullying through tort claims such as intentional infliction of emotional distress, defamation, and tortious interference that are based on or include some element reflecting social norms and standards.

Finally, implementation of bullying policies by employers will not only provide internal mechanisms for redressing workplace bullying, but may eventually provide a legal remedy when employers fail to protect their employees from bullying. Many states – have developed bodies of law that permit employees to enforce employee policies under the proper circumstances, even when such policies are not part of an employee’s contract. (See, e.g., Toussaint v. Blue Cross Blue Shield of MI, 408 Mich. 579; 292 N.W.2d 880 (1980); Duldulao v. St. Mary of Nazareth Hosp. Ctr., 115 Ill. 2d. 482, 489-492, 505 NE2d 514 (1987); Weiner v. McGraw-Hill, Inc., 57 NY2d 458, 465-466, 443 NE2d 441 (1982); Leikvold v. Valley View Community Hosp., 141 Ariz. 544, 546-548, 688 P.2d 170 (1984); Brooks v. Trans World Airlines Inc., 574 F. Supp. 805, 808-810 (D. Colo. 1983);
Lincoln v. Sterling Drug, Inc., 622 F. Supp. 66, 67 (D. Conn. 1985); Pine River State Bank v. Mettille, 333 NW2d 622, 626-627 (Minn. 1983); Southwest Gas Corp. v. Ahmad, 99 Nev. 594, 595, 668 P.2d 261 (1983).) Employers that implement policies are likely to actively implement and enforce them, not simply based on economic self-interest, but because of liability risks associated with uneven enforcement. Such circumstances will help to create expectations in employees regarding the binding nature of the policies, and should eventually permit employees to enforce them to their benefit, where the failure to act by an employer leads to an employee’s constructive discharge.

There is no doubt that workplace bullying remains a serious problem for employees. There is, however, a growing recognition that workplace bullying is a problem for everybody, not simply employees, and employees stand a better of shot of obtaining relief from within their own organization as a consequence. Employees seeking legal redress are still at a disadvantage given the current state of the law, although a small, but growing body of case law suggests that at least in extreme cases, employees may be able to obtain some relief from the courts. Moreover, in the larger context, there appears to be significant momentum building to bring about concrete changes in how the legal system treats workplace bullying, and to pass workplace bulling legislation analogous to school anti-bullying and anti-hazing laws that have already been enacted in the majority of states.