

Bullying—The New Workplace Liability for Hospitals and Health Care Employers

Gregory A. Mattacola*
Hancock Estabrook LLP
Syracuse, NY

There exists a never-ending and seemingly endless list of ways a health care employer can run afoul of workplace laws or regulations. Wage and hour concerns, complying with the Affordable Care Act, environmental safety, and hiring/firing lawfully are just a few of the concerns hospitals and other health care employers face regularly. Should workplace bullying be added to that list?

The term “bully” or “bullying” is one that seems to lie at the epicenter of modern lexicon with more discussion about it than ever before. Yet, what is it really? One should examine its definition(s) as a precursor to this discussion.

What Is bullying?

Webster defines a bully as “a person who teases, hurts, or threatens smaller or weaker persons”. To bully someone is to “frighten, hurt, or threaten (a smaller or weaker person); to cause (someone) to do something by making threats or insults or by using force.”¹

The Workplace Bullying Institute (WBI) is an organization led by psychologists and other education and behavioral science professionals that is devoted to the issue of bullying in the workplace. It defines workplace bullying as “repeated, health-harming mistreatment of one or more persons (the targets) by one or more perpetrators.” It is abusive conduct that is:

- Threatening, humiliating, or intimidating; or
- Work interference— sabotage—which prevents work from getting done; or
- Verbal abuse.

This definition was used in the 2014 WBI Workplace Bullying Survey that WBI had commissioned by pollster John Zogby.²

Peruse any number of websites, journals, or periodicals and similar versions of the above definitions emerge. But for most individuals, bullying seems to fall under the umbrella of former U.S. Supreme Court Justice Potter Stewart’s ability to identify pornography—“I know it when I see it.”³ It is repetitive, nasty, harassing behavior by one employee toward another that is being perpetrated for any number of reasons. And it’s a problem.



Whether this problem has always existed and is only now getting attention, or for any number of other reasons, there is no question that this issue is a real one that employers would do well to address.

Parallels with Unlawful Harassment

One may ask—why the importance? If an employee is giving another employee a hard time, isn’t that simply a personal problem between those individuals? That question is most easily answered by the U.S. Equal Employment Opportunity Commission guidance on workplace harassment:

Harassment is a form of employment discrimination that violates Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, (ADEA), and the Americans with Disabilities Act of 1990, (ADA). Harassment is unwelcome conduct that is based on race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. Harassment becomes unlawful where 1) enduring the offensive conduct becomes

a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.⁴

Compare this with the definitions of bullying. “Threatening . . . humiliating . . . verbal abuse . . . work interference.” Are these not the same things? Would that same behavior not be unwelcome conduct that is severe or pervasive enough to create a hostile, intimidating, or abusive work environment? It very well could—hence the importance to health care employers, administrators, supervisors, etc. Review what conduct can rise to the level of workplace harassment:

Offensive conduct may include, but is not limited to, offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance. Harassment can occur in a variety of circumstances, including, but not limited to, the following:

- The harasser can be the victim’s supervisor, a supervisor in another area, an agent of the employer, a co-worker, or a non-employee.
- The victim does not have to be the person harassed, but can be anyone affected by the offensive conduct.
- Unlawful harassment may occur without economic injury to, or discharge of, the victim.⁵

The overlap between bullying and unlawful harassment is clear, and therefore, the risk of legal liability is equally clear. For “bullying” to fall within any of the workplace discrimination statutes for purposes of triggering employer liability, there has to be a protected class—gender, age, color, etc.—at the root of the inappropriate behavior. But what lies at the root of classic bullying? Picking on someone who is different. That difference may be age, gender, religion, or any number of things, many of which fall within legally protected classifications and could give rise to employer liability. And while not specifically mentioned in the federal statutes, numerous state statutes extend protections to sexual orientation and transgender status, so inappropriate conduct against those classifications can lead to legal liability, as well.

What Can Employers Do to Protect Themselves?

How does an employer monitor and defend against this potential liability? The best way is to be proactive. Start with this list:

- Review employee handbooks and policies;
- Ensure that all forms of harassing and intimidating conduct are specifically prohibited, both in policies and in practice;
- Create multiple confidential and accessible ways for employees to report unwanted behavior so they feel safe in doing so; and
- Appoint designated investigative officers who look into allegations of inappropriate behavior and create summaries of their findings, and who, in tandem with counsel, make recommendations as to any corrective action.

Implementing this list can provide to health care employers a strong affirmative defense against any claims. Retaliation also should not be overlooked. If an employee comes forward and reports offensive conduct, even if that conduct would not have given rise to a valid claim, any retaliatory behavior that comes afterwards still will give rise to a claim. Workplace bullying is an old problem with a fresh face, and it is not going anywhere. The best an employer can do is be vigilant, be watchful, and react swiftly and appropriately when these issues arise.

**Formerly Vice President/Hospital Counsel of Rome Memorial Hospital Inc., Gregory A. Mattacola recently became Counsel at Hancock Estabrook LLP in Syracuse, NY where he is a member of their Health Law Group.*

1 In MERRIAM-WEBSTER’S online dictionary (11th ed.), available at www.merriam-webster.com/dictionary/bully.
2 WBI, Definition of Bullying, available at www.workplacebullying.org/individuals/problem/definition.
3 *Jacobellis v. Ohio*, 378 U.S. 184 (1964).
4 EEOC, Harassment and Employer Liability for Harassment, available at www.eeoc.gov/laws/types/harassment.cfm.
5 *Id.*