Don’t Hate, Tolerate: Sexual Orientation, Bullying, and Tolerance in the Workplace

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#LaborLawTrends; @BlankRomeLLP
Focusing on the Evolving Workplace

- Gray area between inappropriate bullying and unlawful discrimination and harassment
- New and changing state/local laws
- Updating policies and practices to reduce potential liability
- Added exposure resulting from social media
- Promote tolerance to improve morale and productivity
The Slippery Slope of Workplace Intolerance

BULLYING

DISCRIMINATION

HARASSMENT

VIOLENCE
Extra, Extra, Read All About It!!

Bullied Microsoft Employee Gave His “Heart and Soul” to the Company
May 23, 2014, 08:00:00AM. By Brenda Craig

Ex-Rutgers Employee Says She Was Fired For Being Gay

The New York Times

‘A Classic Case of Bullying’ on the Dolphins, Report Finds
By BEN SHAPIRO FEB. 14, 2014

NFL reminds teams of sexual orientation, harassment policy
By Kevin Patra | NFL.com
Published: April 29, 2013 at 10:31 a.m. Updated: April 30, 2013 at 12:07 a.m.

#LaborLawTrends: @BlankRomeLLP
Hot Topic
Bullying
Bullying: Identifying it in the Workplace

- Examples of conduct that causes problems
  - Losing temper; shouting
  - Pointing in someone’s face
  - Picking on colleagues
  - Inappropriate jokes
  - Cursing and insults
  - Demeaning comments

Can occur face-to-face, or indirectly by e-mail, texting, or social media.
Bullying: 

Approaching the “Danger Zone”

- If it’s not illegal, why emphasize a respectful, bully-free workplace?
  - Right thing to do
  - Fewer complaints
  - Increases productivity
  - Better work environment
  - Reduce opportunity for conflict/violence

- Identify when bullying becomes harassment

**WATCH FOR:** Physical or verbal conduct that could quickly escalate into full-blown harassment
Laws that Cast a Wider Net

• Amendment to California’s Fair Employment and Housing Act (“FEHA”) broadens definition of harassment
  – No longer requires that plaintiff prove harassment is motivated by sexual interest or desire
  – Encompasses bullying behavior in zone of “unlawful behavior”

• Application → Taylor v. Nabors Drilling USA
  • Plaintiff (heterosexual male) called homophobic epithets while working on oil rig. No proof of sexual motivation or desire.
  • Jury awards $160,000 on hostile environment claim
State Anti-Bullying Laws

- The Healthy Workplace Bill
  - Introduced in 26 states; active bills in 15
  - Offers avenue for redress for “health-harming cruelty” at work
  - Defines “abusive work environment” with high standard for misconduct
  - Plaintiff can sue bully in his/her individual capacity
The “New Water Cooler”

Responsibility in the Extended Workplace

• Traditional workplace does not always end at the company doors
  – Work-related travel and events
  – After-hours
  – The virtual workplace
• Misconduct directed at employees by customers or vendors

| County hammered with $820,000 verdict for |
| not protecting disabled employee |
| Disabled corrections officer harassed online and at work |

How does social media complicate matters?
Identify, avoid, and prevent inappropriate conduct
Monitor changing local and state laws
Train your workforce
Update / develop policies on bullying
IF YOU CAN SEE IT, HANDLE IT
Hot Topic

Workplace Violence
Workplace Violence

- Any violence, physical assault, or significant threatening behavior in the work setting
- Know how to identify warning signs and indicators
- Need for standards of conduct and reporting policies
- Using background checks
  - EEOC guidance
  - State and local laws
- Remember: Harboring a workplace bully could lead to liability if the behavior becomes harassing or violent

STOP AND THINK

Does your company have a standard of conduct?
Would your employees know what to do?
Are you Headed Toward the Bottom of the Slippery Slope?

An example of how unresolved bullying leads to violence

– Ronaldo Negrin was a TSA screener in Miami, Florida.
– During a “body scan training exercise,” it was revealed that Negrin had a small penis.
– For months afterward, Negrin was teased and ridiculed by his colleagues. Co-workers laughed off his pleas for compassion.
– According to a police report, Negrin stated he “could not take the jokes anymore and lost [his] mind.” He violently assaulted an employee.
✓ Recognize the potential for workplace violence
✓ Identify and defuse behavior that could lead to violence
✓ Determine whether your reporting policy is adequate
✓ Update / develop policies on violence
✓ Create anti-violence action committee
✓ Create and train on emergency response protocols
✓ TAKE ALL COMPLAINTS SERIOUSLY
Hot Topic

Sexual Orientation/Gender Identity

Achieving a workplace where employees are treated fairly and are judged on their work
Prevalence of Harassment and Discrimination

<table>
<thead>
<tr>
<th></th>
<th>Any Form of Discrimination</th>
<th>Harassment</th>
<th>Lost a Job</th>
</tr>
</thead>
<tbody>
<tr>
<td>All LGB Respondents</td>
<td>27.1%</td>
<td>27.1%</td>
<td>7.1%</td>
</tr>
<tr>
<td>Out of Work LGB Respondents</td>
<td>37.7%</td>
<td>38.2%</td>
<td>9.2%</td>
</tr>
<tr>
<td>Not out of work LGB Respondents</td>
<td>10.4%</td>
<td>10.4%</td>
<td>0%</td>
</tr>
</tbody>
</table>

**BUT**: Those who express transgender identity or gender non-conformity experience disproportionately higher rates of discrimination:

- **78%** report at least one form of harassment/mistreatment
- **47%** report discrimination in hiring/firing/job retention
Limited Protections for Sexual Orientation and Gender Identity

• Limited protections under federal law
  – Sexual orientation and gender identity are not protected classes under Title VII
  – Attempts to bootstrap protection through same-sex harassment and gender-nonconformity claims are limited

• State Laws
  – Pennsylvania – No state law
  – New Jersey – Protects both
  – New York – Only protects sexual orientation

• Local Laws
  – Philadelphia – protects both
  – New York City – protects both
Changing Legal Landscape Likely to Provide Greater Protections

- Federal Employee Nondiscrimination Act ("ENDA")
  - Would prohibit private employers with more than 15 employees from discriminating on the basis of both sexual orientation and gender identity
  - Passed the Senate on November 7, 2013 (64-32)
  - Currently stalled in House

- Possible new state protections

- Marriage Equality
  - Implications for employees with same-sex spouses
  - FMLA issues
✓ Update harassment/discrimination policies to include sexual orientation and gender identity
✓ Promote tolerance and train your workforce
✓ Identify and defuse bullying behavior targeted at sexual orientation and gender identity
✓ Monitor and prepare for new legal protections
✓ STAY AHEAD OF THE GAME
Other Emerging Issues in the Evolving Workplace

• Continued focus on religious accommodation
  – New EEOC Guidelines on Religious Garb and Grooming

• Pregnancy Accommodation Laws
  – NYC (Jan. 2014)
  – NJ Pregnant Worker’s Fairness Act (Jan. 30, 2014)

• Leaves of Absence for Domestic Violence / Sexual Assault Issues
Evaluate your workplace
Identify gaps in corporate policies
Determine whether to take a stricter approach to bullying
Consider if your policies and practices will be in line with the changing legal landscape
“BUY IN” TO TOLERANCE IN THE WORKPLACE
Questions?