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HARASSMENT

A STAND ALONE CAUSE FOR DISCIPLINE?

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*a special thanks to Wendy Rouder for her reading and comments for this paper made after her quarter century of public sector labor and employment law practice

Foreshadowing A Path Toward Independence from Protected Status

Six months ago the California Supreme Court affirmed that harassment in the workplace is its own cause of action analytically independent from employment discrimination (*Roby v. McKesson Corporation* 47 Cal.4th 686, 219 P.3d 749, 101 Cal.Rptr.3d 773 (2009). While noting the statutory basis for a cause of action for harassment independent of discrimination (Gov. Code Section. 12940, subd. (j)), the Court stated: "Because the FEHA treats harassment in a separate provision, there is no reason to construe FEHA's prohibition against discrimination broadly to include harassment."

There is an evidentiary reason for analytically separating harassment from discrimination. With discrimination, California law looks to evidence of "*explicit* changes" in the terms and conditions of employment (*Roby* at 708 citing *Reno v. Baird* 18 Cal.4th 640,645-647, 957 P.2d 1333, 76 Cal.Rptr.2d 499 (1998) and that change is the product of employer *qua* business entity action. In contrast, the complainant in a harassment case often has not suffered any discipline or monetary loss or any other explicit change in the terms or conditions of employment. Rather than assess changes in a business relationship that occur with discrimination, harassment can be viewed as a sociological cause of action: "harassment focuses on situations in which the *social environment* of the workplace becomes intolerable because the harassment (whether verbal, physical or visual) communicates an offensive message to the harassed employee." (*Roby* at 705.)

In discrimination cases there is cause to analyze who the employer is as a business and what the employer has done to alter the employment relationship:. "[D]iscrimination refers to bias in the exercise of official actions on behalf of the employer…." *(Roby* at 705) The concept of "official actions" does not invariably come into play in harassment and should not be confused with employer liability for harassment. "Official actions" for the litigator becomes a matter of evidence. In discrimination cases "official actions" are core proof, whereas in harassment cases official actions are what one might deem proof *possibly* available to either party to work into his or her litigation strategy. The possibility depends, according to *Roby*, on whether "that evidence is relevant to prove the communication of a hostile message." (*Roby* at 707).

While what constitutes "sexual harassment" under California law is well-settled (Miller v. Dept. of Corrections (2005) 36 Ca, 4th 446 , *Court of Appeal v. C.R. Tenant Healthcare Corp*.(2009); *Brown v. Smith* (1997) 55 Cal.App.4th 767, (1997), the law of workplace harassment may be open to further development by the courts if *Roby* serves to foreshadow. And the BAJI committee, noting that in *Augilar v. Avis Rent a Car System, Inc* (1999) 21 Cal. 4th 121, 130 the Supreme Court applied a sexual harassment analysis to a racial harassment set of facts, suggested that a single jury instruction be utilized in "all hostile environment cases." (Notes, BAJI 12.05 [7] [8].

In *Roby* the primary cause of action was disability discrimination under FEHA and the issue was not the appropriate jury instruction but rather the admissibility of a

certain type of evidence to prove harassment. There was no dispute that the employer terminated the plaintiff citing plaintiff's excessive absenteeism. A cause of action for disability discrimination was supported by the termination which was clearly an official action resulting in plaintiff's pecuniary loss. However, *Roby*'s counsel also added a cause of action for disability harassment by plaintiff's supervisor, bringing into play individual liability as well entity liability. The alleged harasser was the same supervisor who was charged with progressively disciplining plaintiff for her absences. In a legal contest over the sufficiency of the evidence to support the jury's finding of disability harassment the Supreme Court did not focus on whether the conduct by the supervisor, which combined both official acts and personal bias, was severe or pervasive. Rather, the Court allowed that official acts by the manager – acts which "fell within the scope of the business and management duties" and evidence of discrimination ---could be introduced as well with the more typically personal hostile acts present in a harassment case to create a total picture: "[A]cts of discrimination can provide evidentiary support for a harassment claim by establishing discriminatory animus on the part of the manager responsible for discrimination. . .." (*Roby* at 709)

Whether one considers *Roby* as segregating the distinction between harassment and discrimination or blurring it, the case nevertheless invites consideration of what other developments await in the sphere of "harassment'. For example, will it take a legislative act to prohibit bullying in the workplace, akin to the anti-bullying legislation passed in most states involving public school including California (Ed. Code Sec. 200-202).? Or will workplace bullying – with accompanying employer liability for failure to investigate or respond -- be found to fall within the penumbra of an allegation which names a protected status with only a modicum of proof required?

Actionable Behavior and Bad Behavior

Causes for discipline are as many as the workplace rules and policies of which an employer can conceive (and successfully negotiate with employee representatives if the rule or policy affects a term and condition of employment). But a prohibition against harassment and discrimination should rise to a special level of interest for the employer because employee conduct implicating harassment presents multiple types of liabilities for the employer: external civil liability (via lawsuits or worker's compensation to the alleged victim employee) or via back pay awards to the alleged wrong-doer employee too harshly or improperly penalized for workplace conduct.

In a civil action for unlawful harassment, in addition to a nexus between a protected status and the offending behavior, the offending behavior must subjectively and objectively be perceived as abusive, and specifically "an employer's mere utterance of ethnic or racial epithet which engenders offensive feeling in an employee "does not constitute such a work environment. Consider the kind of harassment that occurred in *Elmahdi v. Marriott* 339 F3d 645 (8th Cir. 2003) where over Plaintiff alleged he was harassed by a co-worker who touched his genitals, called him "boy" and "black boy" on several occasions, told him he had a "gorgeous butt" and said Africans as have "big

penises." The co-worker denied these allegations. The court affirmed the District Court's grant of judgment as a matter of law that the statements, while offensive, did not constitute "a steady barrage of opprobrious racial comment" sufficient to support a Section 1981 claim of hostile work environment and the harassment was not so severe that it would be "viewed objectively by a reasonable person as it was actually viewed subjectively by the victim." Although not at issue in *Elmahdi*, *supra*, an employer would benefit from a strong showing of having taken immediate and appropriate corrective action list lest another appellate court draw a different conclusion about defendant's behavior.[1]

Employers in civil cases have an affirmative defense to claims of unlawful harassment if they can demonstrate that they exercised reasonable care to correct and prevent promptly any harassing behavior and that the plaintiff failed to take advantage of any preventive or otherwise corrective opportunities offered by the employer to avoid harm. However, employers who take prompt corrective action may see their discipline or termination decisions overruled in arbitration awards when arbitrators find procedural or equitable reasons to change the decision. This concern does not justify a failure to take corrective action and failure to do so may prevent a showing of an affirmative defense.

Fear or even consideration of back pay awards, couched in evidence of historical arbitral practice, will not hold sway with the courts as a reason for failure to discipline. In *Equal Employment Opportunity Commission v Indiana Bell Telephone Company*, 256 F.3d 516 (7th Cir. 2001) the court of appeals, sitting *en banc*, determined that an employer's failure to take action against an employee who had a long history of serious complaints about sexual harassment because the employer feared the labor arbitrator would not approve the disciplinary action was not relevant to the question of the employer's liability. However**,** with regard to punitive damages, the court held that the evidence of historical arbitral decisions was admissible to show the employer's state of mind to show why the defendant acted as it did, for such evidence bears on "malice", "reckless indifference to the federally protected rights of an aggrieved individual", and the size of any appropriate punitive award.

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[1] For those interested in the kind of latitude given by some courts such as the New Jersey Court of Appeals before a violation is found, consider *Cutler v Dorn*, 196 N.J. 419 (2008 In *Cutler*, the plaintiff was a police officer who alleged co-workers and supervisors had engaged in anti-Semitic conduct over a period of five years. The allegations included comments by supervisors, including the Chief of Police, such as "why don't you have a "big Jew…nose," "Jews make all the money," and "dirty Jews." Co-workers put Israeli and German flags on plaintiff's locker. Plaintiff filed a complaint alleging a hostile work environment. Defendants claimed that all officers were subject to similar "ribbing" at work. A jury found for plaintiff, but the Court of Appeals reversed the verdict, finding that the conduct was not severe or pervasive and characterizing it as "teasing." Not surprising to a California practitioner, the New Jersey Supreme Court reversed, noting in most cases the cumulative impact of separate successive incidents cements the hostile work environment and held that the standard of proof in religion and ancestry based hostile work environment claims is no greater than in sex or race based claims.

Labor Arbitrators View Harassment

Labor arbitrators do not always assess facts in grievance arbitrations using the standards set by the court when determining whether there was just cause for discipline imposed on the Grievant. Arbitrator decisions are highly fact-based and different arbitrators may come to different conclusions based on the same or similar facts. Some arbitrators will use legal standards in determining whether an employee engaged in harassment based on a protected category and others may rely solely on the wording of employer policy or MOU language. And, arbitrators may take into account many other issues, such as whether the intent of the harasser was malicious, the Grievant's length of service and any prior discipline in deciding whether there was just cause for discipline. Employers may have more power to take action and discipline an employee even when the behavior does not rise to *unlawful* harassment if the employee behavior violates another policy such as one which prohibits discourteous treatment (for example, a prohibition on insulting or threatening behavior towards employees or members of the public).

Racial Harassment

The Pepsi Bottling Group, Inc and International Brotherhood of Teamsters, Local Union No. 397 09-1 Lab. Arb. Awards (CCH) ¶ 4451 (2007) (Paolucci, Arb.)

Grievant used work "nigger" repeatedly in a 2 week period. Complainant told Grievant to stop. Grievant stopped using the word as often, but slipped. He apologized and asked whether should say something to co-workers about the fact that he did not understand how hurtful the word was. Grievant and complainant talked to co-workers and explained the word was improper and would not be used any longer. Grievant said did not understand impact of the word and thought it was part of every day conversation. Grievant was suspended pending an investigation and eventually discharged him. The employer contended the action was based on Grievant's many racial slurs and not a single joke or one bad act, while the Union argued the use of the word was a very minor incident resolved by two employees and that Grievant did not use the word maliciously. The Union conceded that the word was offensive and one of the "worst words in the English language and (is) inexcusable." However, the Union also claimed the meaning of the word 'nigger" has changed has over time, now has **a** different impact between generations and races than it had in the past, and that the younger generation may use it as a sign of humor, comradeship, as well as the insult for which it is traditionally known. The Arbitrator noted that Grievant "truly did not want to insult (A) and when informed that he was acting poorly, took steps to make sure no one else acted that way" but that he continued to use the word. Despite words that suggested the arbitrator might give weight to the Grievant's efforts to undo the wrong, the award concluded employer must be able to discharge a short term employee for using some of the "most offensive language known in the English Language."

<u>Practice Note</u>: Look to the length of the Grievant's employment to assess your case for arbitration

Hendrickson Truck Suspension System and United Electrical, Radio and Machine Workers of America, Local 770 125 Lab. Arb. Rep. (BNA) 1349 (2008) (Lalka, Arb.)

The employer had a Zero Tolerance policy for racial harassment. Grievant used the word "nigger" on two occasions and the employer terminated him, based on the employer's Zero Tolerance policy. The union argued that employees had never been on notice of the Zero Tolerance Policy until after notices were posted after investigation of this complaint. The employer contended that all employees received a rulebook outlining prohibited behavior and attended a presentation called "It's All About Respect." However, the employer was not able to point to anything in the rulebook that indicated a Zero Tolerance Policy was in effect. The rulebook stated that the employer may bypass or repeat steps of the disciplinary procedure depending on the seriousness of the offense and the presentation said only that harassment and discrimination "can result in losing your job." The Arbitrator found that because employees were not on notice that racial comments would result in termination in all circumstances, the Grievant's termination based on a so-called Zero Tolerance policy was not justified. The arbitrator then set criteria for analysis that are not found in established law**:** the Grievant did not create a hostile work environment because he was not malicious or confrontational and none of the witnesses or the complainant believed that the Grievant should be terminated. The Arbitrator stated '...one of the elements of just cause is that the level of discipline be commensurate with the infraction. Under the facts adduces herein, termination was not commensurate with the Greivant's action of trying to be, as described by (complainant), "smart and funny." The arbitrator awarded reinstatement but noted that back pay was not appropriate because Grievant denied having made the comments until the time of the Arbitration Hearing.

<u>Practice Note:</u> Before an employer relies on popular terminology such as "zero tolerance" that term needs to be defined in a writing known to employees and the union.

Sexual Harassment

In re Department of Veterans Affairs and American Federation of Government Employees 103 Lab. Arb. Rep. (BNA) 343 (1994) (Gangle, Arb.)

Grievant was suspended for making obscene remarks to two other male employees. These remarks occurred during a locker room discussion about President Clinton and Monica Lewinski. Grievant asked Complainant if he

wanted “a blow job” and repeated the question as complainant was walking out of the room. One witness employee testified that there was a lot of conversation like this in the locker room and another said he heard comments such as this and ignored them. The Arbitrator concluded that a 5 day suspension was appropriate. The arbitrator noted that: “There are some types of misconduct that are considered so egregious that they are generally known to be prohibited in all workplaces. Employers do not need to publish specific work rules prohibiting such misconduct and arbitrators will usually uphold disciplinary actions that are based on proven incidents of such misconduct. Some arbitrators are now including workplace sexual harassment, including excessive profanity or obscenity directed at others among “generally forbidden” categories.”

Equistar Chemicals LLP and International Union of Operating Engineers 126 Lab.Arb. Rep. (BNA) 1480 (2009) (Goldstein, Arb.)

Grievant placed two fingers in the crotch area of a 70 year old worker’s coverall uniform, wiggling his fingers while making a “wooo-woo-hoo-hoo” noise. Two co-workers complained but the Grievant and victim denied anything unusual had happened. The arbitrator found that neither of them were credible, but concluded the misbehavior was malicious horseplay which violated the employer’s policy against ridicule and intimidation. Much as the courts have done, the arbitrator noted that not every insult, touching or bad joke fell under the “sexual harassment arm of the employer’s anti-discrimination policy and that it was very possible Grievant’s behavior had no sexual significance. The award reduced Grievant’s demotion to a month’s suspension with seniority and back pay.

Federal Aviation Administration and Professional Airways Systems Specialists Award 112 Lab Arb. Rep. (BNA) 129 (1999) (Sergent, Arb.)

Grievant told co-worker he loved her, would take care of her, and said “I can give you what you need, you make me feel good.” The female co-worker testified the male’s most frightening and provocative remark was “to the effect that if her husband couldn’t satisfy her he would be there for her.” She complained to her supervisor and a few days later, Grievant approached her again and said he loved her. The employer imposed a 3 day suspension, based on violation of Agency policy which states “Acts of a sexual nature are prohibited” and “that a single incident will result in discipline.” The policy defines such acts as “unwelcome sexual teasing, remarks, or questions an unwelcome sexual looks or gestures, such as leering or ogling” and defines “unwelcome” as meaning the “affected employee did not solicit the action and regarded the conduct as undesirable or offensive.” The arbitrator denied the grievance, saying the comments were not an isolated occurrence and that the decision about an appropriate penalty is generally within the employer’s discretion and should not change absent compelling evidence of abuse of discretion. He went on to note that the decision not only put

the Grievant on notice that such behavior was unacceptable but also served as a warning to other employees

Practice Note for Employer Attorneys Although arbitrators do not rely on precedent, an employer attorney may want to cite this award when arguing the penalty should stand. And union attorney might fare well, if the case so warrants, by either arguing in a statement of arbitral issues or securing a pre-arbitration agreement from the employer that the arbitrator shall determine the appropriate penalty if misconduct is proven

City of Key West 106 Lab.Arb. Rep. (BNA) 653 (1996) (Wolfson, Arb.)

Grievant was a 16 year veteran of the police department and a supervisor. He was demoted from Captain to patrolman because of his interaction with a subordinate female police officer. When she requested a shift change so she could spend Christmas with her children, he said "You should have had an abortion." He also told her that she should "bring in knee pads if you want something around here." As a result of these comments, Grievant was demoted. The arbitrator found that the single comment about abortion created a hostile and offensive work environment and that there was just cause to discipline Grievant for this statement. The arbitrator found no just cause for discipline for the comment about knee pads because it was not connected with "employment advances or connected with sex or sexual harassment," even though it was inappropriate. The award ordered reversal of the demotion and a 30 day suspension as a result of Grievant's behavior.

Practice Note: The arbitrator opined that demotion was only appropriate where poor performance results from incompetence. In this instance, there was no showing of incompetence but rather a failure of the employee to carry out his duties as a result of deliberate misconduct and improper attitudes. Panelists for the program offered in conjunction with these materials will discuss the use of demotion as a penalty for misconduct not touching on competence. Union attorneys should avail themselves in argument of the far-reaching consequences of demotion such as its impact on pension benefits as well as the absence of a logical connection between demotion and behavior as distinguished from performance.

In re Independent School District No. 255, Pine Island Minn. and Minnesota Education Association 102 Lab. Arb. Rep. (BNA) 993 (1994) (Daly, Arb.)

School District discharged a male teacher who admitted touching and hugging sixth, seventh and eighth grade girls. Grievant contended the touching was not sexual. The Union argued that his actions were a 'nurturing touch" and that they

could be misconstrued. Grievant denied touching any of the girls in a sexual manner.

The Arbitrator, in a lengthy discussion, stated: "...the School District has not shown by a preponderance of the evidence that the girls have been touched or patted on the buttocks. Nevertheless, the District has clearly shown that the girls are telling the truth as they see it and (Grievant's) behavior made them 'sick, uneasy and uncomfortable.'" Other students raised additional charges including touching one student's breast. The Arbitrator, referencing state statute, said he must determine whether the School District has demonstrated by a preponderance of the evidence "immoral conduct, insubordination or conduct unbecoming a teacher which requires the immediate removal of the teacher from the classroom". Evidence from the hearing included testimony from Grievant's psychologist who said Grievant tended to minimize and deny things, including things such as prior warnings about using sexist terms and making students uncomfortable when he touched them. The Arbitrator held the touching by the Grievant was not sexual touching and further held that the touching "violated the boundaries of each of the students causing them to be 'uncomfortable,' 'be upset' and 'to misunderstand.'" The arbitrator concluded that Grievant "must have it clearly spelled out to him that he can no longer touch a student as part of his teaching method."

The arbitrator's award ordered the teacher to enter into a written "no touch agreement" and be returned to work. This award was based on the arbitrator's determination that the teacher did not touch the girls for sexual reasons, he had no prior discipline, he was a very long term employee who had positively affected the lives of many children, and the "no touch" agreement was fair to all.

Note to Union Practitioners: Grievants' attorneys may want to have this award available for arbitrators considering penalty in a "touching" case, particularly where the employer's policy prohibits all "harassment" or "harassment of any kind.

City of Fort Worth, Texas and Individual Grievant, 108 Lab. Arb. Rep (BNA) 924 (1997) (Moore, Arb.)

Indefinite suspension upheld in arbitrator's award. Facts showed an egregious harassment by a Fire Lieutenant (a 22 year veteran) including same sex harassment and touching. The Department's regulations were clear on what behavior was prohibited. The lieutenant engaged in intimate physical contact with a male subordinate who was in training. He put his hands in the pockets of the male trainee and pulled him towards him, causing the victim's buttocks to come in contact with Grievant's genitals, saying "I like this. Do you like this?" He stepped into a classroom of trainees and asked if anyone wanted to go camping. Some of the trainees indicated they were interested, and Grievant asked "If you woke up with a rubber hanging out of your ass would you tell anyone?"

Finally, while he was participating in training for the new trainees, he put a spanner wrench between a trainee's legs and pulled his towards him until they were in physical contact. The Union argued that the actions were horseplay and that similar things had been done to Grievant when he was a trainee 22 years before.

Grievant, relying on comparative punishment, argued that another male supervisor had been given a three day disciplinary lay-off for "violating the personal space of two females" and claimed he was receiving harsher treatment. The arbitrator noted that the so-called harsher penalty could be supported by that fact that subsequent to the incident involving the other male supervisor, Grievant was aware that the employer's policies had been revised to be clearer, the Grievant had received sensitivity training which had been provided to all employees, and that the Grievant was specifically charged with carrying out City's anti-harassment program.

Practice Note: An indefinite suspension is a very rare penalty. The authors of this article suspect that the employer chose indefinite suspension (rather than termination or lengthy definite suspension) for articulable reasons not cited in the published award but know to the arbitrator. One possible reason could be that the Grievant would not be able to retire under local law if he were terminated for misconduct. This certainly would be evidence many arbitrators would find sympathetic.

In Re Lane County and Lane County Public Works Association, Local 626 111 Lab. Arb. Rep. (BNA) 481 (1998) (Downing, Arb.)

Grievant, a16 year employee of the County, became angry when his tractor was not ready and used obscenities and yelled at another employee about the way the County performed repairs on equipment. He apologized to the employee, but another employee complained about the language Grievant used. Grievant received a one day suspension. Evidence and argument linked his behavior to a violation of a work- rule prohibiting "discourteous treatment of the public or other employees." Grievant was disciplined for violation of the Administrative Procedure Manual policy which forbids "discourteous treatment and behavior discrediting the Department and the County. The employer's Administrative Procedure Manual sets forth a list of progressive discipline by action and occurrence and an assessment of the severity of the action. It also included a "Suggested Guide to Disciplinary Actions." The arbitrator noted that tardiness and horseplay are listed as minor offenses, threatening a supervisor is a serious offense and dishonesty is a major offense. The arbitrator concluded that the only work rule violation the employer proved was discourteous treatment of colleagues and members of another public agency. This particular offense was not listed in the guide to minor, major or serious actions but the Arbitrator concluded the violation was a minor offense. The arbitrator noted the employee's long work history and good evaluations except for the evaluation after this incident, prior

counseling for similar conduct two years earlier, frustration with the tractor repair situation and the fact that he apologized for his behavior but did not know other employees were offended so did not apologize to them. Because the arbitrator determined that this was a second occurrence of a minor offense, the award provide that the one day suspension did not comply with the terms of the collective bargaining agreement and the suspension should be changed to a written warning.

Practice Note: Labor attorneys on both sides of the table need to advise their clients on how specific any written policy or agreement should be that addresses penalty and if it is in service of the client to have a general commitment via MOU as to the authority of the arbitrator to set or alter a penalty.

In re Renton School District and Service Employees International Union 102 Lab. Arb. Rep. (BNA) 854 (1994) (Wilkinson, Arb.)

Comments custodian made to female teachers and aides constituted sexual harassment, and the employer demoted the Grievant. The arbitrator found that the employer's failure to disclose names of accusers and facts of accusations until the arbitration was a due process violation. The arbitrator concluded that Grievant was guilty of misconduct but would not grant make-whole relief based on employer's failure to provide information because the victims would be penalized if he returned to work at the same locale. The award provided a back pay remedy to Grievant but said the demotion would stand.

Workplace Bullying: A Cause of Action To Be

Arbitrators have awarded back pay and reinstatement in situations where the company's policy does not specifically outline prohibited behavior, employees are not on notice of the policy, or the policy does not make clear that termination will result from a single incident of harassment. As seen above, whether or not legal standards of "unlawful harassment' were met did not control the outcome of an arbitrator's award. Perhaps of greater importance to the arbitrator in disciplining for harassing conduct is not whether the complainant's protected status is implicated but rather whether the employer's policies and/or workrules are clear.

If FEHA requires that actionable conduct has as an element the protected status of the plaintiff and the misconduct of the employer's employee "based upon" that protected status, should an employer have a broader policy? Should, for example, the employer's policy prohibit "all harassment whether or not unlawful"?

Prohibitions against bullying have already worked themselves into California law. The California Education Code, Secs. 200-201 create liability in the context of harassment of public school students. BAJI instructs that as an element of unlawful harassment in violation of the Ed. Code a juror must find that "plaintiff suffered severe,

pervasive and offensive harassment that effectively deprived [him] [or]]her] of the right to equal access to educational opportunities." (BAJI 12.28.2). And California jury instructions already advise of what kinds of behaviors constitute harassment: "A. Verbal harassment including epithets, derogatory comments or slurs; B. Physical harassment including an assault or interference with normal work or movement . . . . c. Visual forms of harassment including derogatory posters, cartoons and drawings." And as a final factor a juror may consider "whether it unreasonably interferes with an employee's work performance." (BAJI 12.05).

Consider the workplace scenario of two white males, one of whom has been jilted as the other has won the affections of the former man's girlfriend. The former continually bickers with the latter instigating with snide comments, practical jokes, *sub rosa* pranks. None of the behaviors rise to the level of materially upsetting the quality of the job performance of the other and thus job performance cannot be the basis for discipline. Neither does the behavior fall under the employer's workplace violence policy. Yet common sense indicates the immature behaviors should be brought to a halt before a workplace injury or the claim of such occurs. An all encompassing policy prohibiting workplace harassment "of any kind" would serve as both the established standard and notice to the errant employee. Further such a policy would provide an employer with a slight advantage in litigation involving protected status harassment as evidencing how seriously the employer considers compliance with law and a work-focused workplace. The open-ended policy has the additional advantage of compelling managers to take action in all instances and not engage in disparate penalties depending upon whether protected status is implicated.

To date legislation had been introduced (but not enacted) in about a quarter of the states to allow employee lawsuits against employers for bullying. The Workplace Bullying Institute reported in February of this year (2010) that eight states currently have pending anti-bullying legislation often referred to as "Healthy Workplace" acts.[2] Given that the California Legislature has already siphoned through the process of formulating a protection for one group (public school student) from bullying, a comparable law for the workplace may be only as far away as the next headline story of how workplace bullying resulted in some major liability for an employer or catastrophic consequence for an employee.

It is of further importance for employer's counsel to note that liability for extreme workplace bullying involving severe physical injury may not need to await an act of the Legislature because the next headline may fall on your client. . Worker's compensation laws cannot successfully be invoked as an exclusive remedy if at the hands of one employee another employee has physically injured or caused the death of the former and done so with the intent to injure (***Lab. Code Sec. 3601, (a)(1).),*** *Torres v. Parkhouse Tires Service, Inc.*(2001), 26 Cal. 4th 995**.** In *Torres* the employer cast the conduct in question as "horseplay." A sales representative for the employer, approached the plaintiff from behind while he was on his knees working on a tire, grabbed plaintiff's back support

[2] http://www.workplacebullying.org/2010/02/26/bills_alive/ The states are Illinois, New York, New Jersey, Connecticut, Vermont, Oaklahoma, Kansas and Utah

belt, lifted him off the ground several times, and finally dropped him on his knees. [2] Suffering a back injury, plaintiff did not return to work. Exclusivity of workers' compensation as a remedy did not avail this employer.

And there is an independent reason for plaintiff or union counsel to favor workplace rules or policies that prohibit harassment or bullying untied to protected status. Such policies should not be considered by employee attorneys an easy ticket to disciplining the represented employee. According to a survey, commissioned by the Workplace Bullying Institute and executed by the noted pollster Zogby, 72%of the bullies are in a position of power as supervisors and manager.[3] Thus, successfully negotiating an anti-bullying policy in the workplace policy is in the interest of the line worker and management.

Conclusion

Perhaps it is in the best interests of employer and worker -- without concern for whether harassment is based on a protected status -- to not await the Legislature to find a wrong in workplace harassment that psychologically injures or even has the potential to psychologically injure. A reasonable definition for prohibited conduct may be culled from combining certain provisions of current protected status harassment (such as the definitions set forth in BAJI) with the Education Code's prohibition of student harassment. Consider advising the removal of the word "unlawful." from the harassment prevention policy your client or your client's employer currently has or advising or advocating, as the role is appropriate, for the creation of such a policy.

[3] http://www.workplacebullying.org/research/WBI-Zogby2007Survey.html