

II. DEALING WITH EMPLOYERS WHO BEHAVE BADLY

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While employers occasionally deal with individuals who are bullied by their co-workers, it is also the case that employees are harassed and bullied by their bosses and supervisors. To some degree, these situations are complicated by the fact that employers have the lawful right to be critical of an employee's performance. Such criticism can be perceived by an employee as overly personal, particularly when there is no preexisting history of discipline, or when the employee who is singled out for criticism by a supervisor suspects that age, race, or some other protected characteristic may be the real motive at play.

A. A Typical Situation—The Case of Ralph the Teacher

About eight years ago I represented a teacher accused of misconduct. The teacher, whom I shall refer to as "Ralph," had been the former president of his union and an outspoken critic of the local school board. When Ralph was unexpectedly called into a meeting by an assistant superintendent, I scrambled to be at the meeting. During the meeting, when Ralph denied the allegations, the assistant supervisor chuckled and told Ralph, "I know that you didn't do it. I just wanted to look into your eyes and see if you would tell the truth." Of course, the whole point of scheduling the meeting without much notice in the first place was to prevent me from being there, and to cause Ralph needless anxiety over the prospect of being disciplined. The assistant superintendent had recently become aware of Ralph's continuing treatment for depression and knew that Ralph was emotionally on edge.

Over the next few weeks, Ralph was called into more meetings on other pretenses. Ralph refused to resign, successfully protected his position, and was instrumental in eventually getting the assistant superintendent fired. Eventually, all of the allegations of misconduct that had been placed in his personnel file were removed and, to this day, Ralph continues to teach in the same school, which is now under the direction of a new administration.

Ultimately, as my work with teachers and other public employees increased over the years, I came to realize that this kind of

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harassment was fairly common, and that Ralph's happy ending was extremely rare. Faced with dire consequences or the prospect of a termination, most employees will voluntarily resign. Moreover, employees who successfully protect their employment do not feel victorious in the end. For many of these individuals, their success is a Pyrrhic victory at best.

According to a 2007 study by the Workplace Bullying Institute, the majority of bullies are bosses (72 percent), 40 percent of bullied individuals never tell their employers, and only 3 percent of bullied individuals file lawsuits.² Furthermore, 45 percent of bullying victims suffer from such stress-related conditions as anxiety, panic attacks, depression, and post-traumatic stress.³ In view of these grim statistics, what are the viable options for dealing with a boss who is a bully?

Aside from the emotional and psychological havoc that bullies can create in the workplace, the bullying supervisor, if left unchecked, can be the catalyst for costly litigation.⁴ In many cases, lawyers who consult with victims of bullying look to traditional causes of action as a way to drag a bullying employer to the courthouse. This would include evaluating a client's ability to sue for violations of state or federal wage and hour laws, sexual harassment, discrimination, the failure to accommodate a disability, or a host of other theories that do not specifically relate to bullying behavior. While these lawsuits can be effective, they do not adequately address the problem.

B. Remedies Available Through Arbitration

Of course, we must recognize at the outset that employees' remedies may be limited by their employment status and their access to union representation.

At-will employees in the private sector are extremely vulnerable and can be terminated without cause, provided there is no illegal basis for their termination, such as discrimination on the basis of some federally protected category. The problem of bullying is most difficult to address in this situation. By contrast, employees

²2007 WBI U.S. Workplace Bullying Survey *available at* <http://www.workplacebullying.org/research/WBI-Zogby2007Survey.html>.

³*Id.*

⁴One recent case of workplace bullying involved a principal from the Vallejo City Unified School District and ultimately cost the district more than \$500,000, when including legal costs and attorney's fees. *See Sarah Rohrs & Kenneth Brooks, Teacher Settles Lawsuit With VCUSD for \$225,000, VALLEJO (CA) TIMES-HERALD*, Feb. 13, 2006.

under a collective bargaining agreement will generally have some measure of protection within the agreement, which requires a showing of just cause by an employer for an employee's suspension or termination.

In such cases, the employee may argue that the particular discipline is not warranted under the just cause requirement of a collective bargaining agreement. The existence of the process is useful even if only to ensure that an employer's decisions are fair. In many cases, the employee may not specifically use the term "bully" to assert that they are being treated unfairly. In these cases, it is implicit that the employee is claiming that the supervisor is not willing to be neutral or objective. Since evidence of satisfactory performance is difficult to quantify, the employee may submit certain evidence or testimony in their defense to establish that their performance is acceptable as viewed by other supervisors or their peers. Such evidence might include a videotape of the employee working, or supportive testimony from friendly supervisors, peers, or third parties.

One of the most effective ways to counter negative testimony or evidence from a supervisor is to cross-examine the supervisor in such a way that the supervisor must concede during his or her own cross-examination that the employee has steadily improved, complied with specific directives, or succeeded in meeting the supervisor's expectations.

In many cases, due process itself is the antidote to the aggressive imposition of discipline by a bully because the employer will be required to shoulder the burden of proof with regard to the appropriateness of the discipline at hand. If an employer has been too aggressive in imposing discipline upon an employee, that employer may have a difficult time establishing that the discipline is warranted. In some cases, however, it is often the intent of the bully to make the employee go through the arbitration process to dispute the discipline at issue. The employer may still feel a victory even if it ultimately loses an arbitration, particularly if the employee is returned to work without back pay. So, what then?

The effect of a bully in the workplace is often keenly felt by the union representative or union-side practitioner because the impact of a bullying supervisor may be seen among various members of the unit with the same complaints relating to stress or unfair and discriminatory treatment. It is in these situations that arbitration of a narrow disciplinary issue may not be sufficient to address the widespread problems caused by an abusive supervisor.

In such cases, employers and employee representatives must look for common ground in how to mend interpersonal relationships between supervisors and employees. Such an approach requires, of course, that the parties are willing to keep an open mind in exploring effective ways to address the situation.

C. Alternatives to Arbitration and the Disciplinary Process

Mediation is preferable to arbitration, but limited in its ability to resolve lingering issues in the workplace. A successful mediation may effectively resolve a short-term dispute but, as with arbitration, cannot sufficiently address the interpersonal problems that may exist between a supervisor and his or her employees unless there is some element to the mediation that includes personal counseling to improve the effectiveness of communication. Such advice is often beyond the abilities of lawyers and arbitrators, who lack the skills and training to counsel individuals in such a manner and cannot provide such advice within the confines of their established roles.

Teachers in California have created a program called “Survive and Thrive” that addresses the mental well-being of teachers who may be suffering from burnout or other emotional issues that may interfere with their ability to cope with a difficult supervisor. The program is well respected among associations and school districts and has accounted for the remarkable recovery of employees who may be considering leaving the profession. It is a program that includes meetings with a therapist and activities aimed at the mental and emotional health of the employee.

The program, which has now existed for more than 10 years, was created by teachers for their colleagues and has no ties to school districts, other than their agreement to pay a portion of the cost of a teacher’s participation. Because it is not considered to be part of the disciplinary process, the sessions do not compromise an employee’s privacy by requiring the disclosure of any personal information to their employer. While such programs cannot completely eliminate the animosity that might exist in the workplace, they are an attempt to address the effects of stress in the workplace that the more typical methods of dispute resolution cannot resolve. Additionally, school districts will actually defer discipline if the employee agrees to take advantage of these resources.

These same opportunities for improvement and reflection are often unavailable in the private sector. With the inability of

employers to address the growing problem of supervisory aggression, employers would be well advised to provide the same kinds of opportunities to their employees and supervisors that teachers have constructed for their peers. Absent such action in the future, special legislation is likely to pass in California and other states across the country to address the problem of bullying in the workplace.