



Anti-Bullying Laws Lead the Next Wave of Rights Legislation

By Jeffrey W. Larroca, JD

In 1962, a newspaper advertisement stating, “Help Wanted — Women Need Not Apply” did not violate federal law. Two years later, Title VII was passed to protect most job applicants and employees from discrimination based on gender, race, color, national origin, and religion. Three years later, passage of the Age Discrimination in Employment Act expanded such protections to include applicants and employees over age 40.

Fast forward to 1990, when the Americans with Disabilities Act was enacted. As President George H.W. Bush stated upon its passage, “Let the shameful walls of exclusion finally come tumbling down.” The law explicitly covered an estimated 43 million Americans who were considered disabled. Employers were not only prohibited from discriminating against individuals with disabilities, but they were also required to provide reasonable accommodations to assist these individuals in their duties.

As these laws passed, a new form of discrimination arose: harassment. Nowhere in the text of the aforementioned laws was there a prohibition against behavior—based on a protected status such as age or sex—that created a hostile work environment. The courts later analyzed such behavior and determined that harassment was a form of discrimination.

In 2008, amendments to ADA

loosened the definitional restrictions courts were applying to who was and was not disabled. Since then, the courts have revisited Title VII’s definition of “sex” and determined that it not only prohibits discrimination against men and women, but also against the transgendered.

In the words of one such court, “A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. The very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior. There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms. Accordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination.”

Additionally, there are analogs to federal law. In states and municipalities, legislatures and other public bodies create new rights for employees every year. In New York City, for example, it is now a violation of law to discriminate against a job applicant who is unemployed. In several states, victims of domestic abuse receive protected status.

As time passes, employment rights expand. Once instituted, they rarely contract.

One new right on the cusp of breaking out is legal protection from bullying. Pennsylvania is one of the latest among more than two dozen states to introduce legislation that would prohibit bullying in the workplace. Indeed, anti-bullying legislation was introduced in 10 states in 2013.

Pennsylvania’s Healthy Workplace Act is much like its counterparts in other jurisdictions. It begins with a sweeping declaration of purpose: The General Assembly finds and declares as follows:

- 1) The purpose of this act is to provide legal redress for employees who have been harmed psychologically, physically or economically by deliberate exposure to abusive work environments and to provide legal incentives for employers to prevent and respond to abusive treatment of employees at work. . . . 3) At least one-third of all employees directly experience health-endangering workplace bullying, abuse and harassment during their working lives. 4) Workplace bullying, abuse and harassment is four times more prevalent than sexual harassment alone. 5) Workplace bullying, mobbing and harassment can inflict serious harm upon targeted employees, including feelings of shame and humiliation, severe

anxiety, depression, suicidal tendencies, impaired immune systems, hypertension, increased risk of cardiovascular disease and symptoms consistent with post-traumatic stress disorder. 6) Abusive work environments can have serious consequences for employers, including reduced employee productivity and morale, higher turnover and absenteeism rates and significant increases in medical and workers' compensation claims. 7) Legal protection from abusive work environments should not be limited to behavior grounded in a protected class status. ... 8) Existing workers' compensation provisions and common-law tort law are inadequate to discourage abusive work environments or to provide adequate redress to employees who have been harmed by abusive work environments.

Translation: It doesn't make sense to have workplace protections against offensive behavior for only some people while others who are not in a protected category have no such protection; a lot of people—one out of three Pennsylvanians—will be or have been bullied in the workplace; and we need to stop it.

If the law is passed, "abusive" conduct—a concept that will vary from jury to jury—will be outlawed in Pennsylvania workplaces, and that prohibition will have sharp teeth. As set forth in the law, "An employer shall be vicariously liable for a violation ... committed by its employee," and that liability can include:

- Reinstatement.
- Removal of the offending party from the plaintiff's work environment.
- Reimbursement for lost wages, front pay, and medical expenses.
- Compensation for pain and suffering.
- Compensation for emotional distress.
- Punitive damages.
- Attorney fees.

Because of a gubernatorial race in 2014, the proposed Pennsylvania act may well receive the boost it needs for passage. That is why employers should get ahead of the curve, institute anti-bullying policies in conjunction with their anti-harassment and workplace violence policies, and emphasize the seriousness of such behavior by a practice of zero-tolerance. ●

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