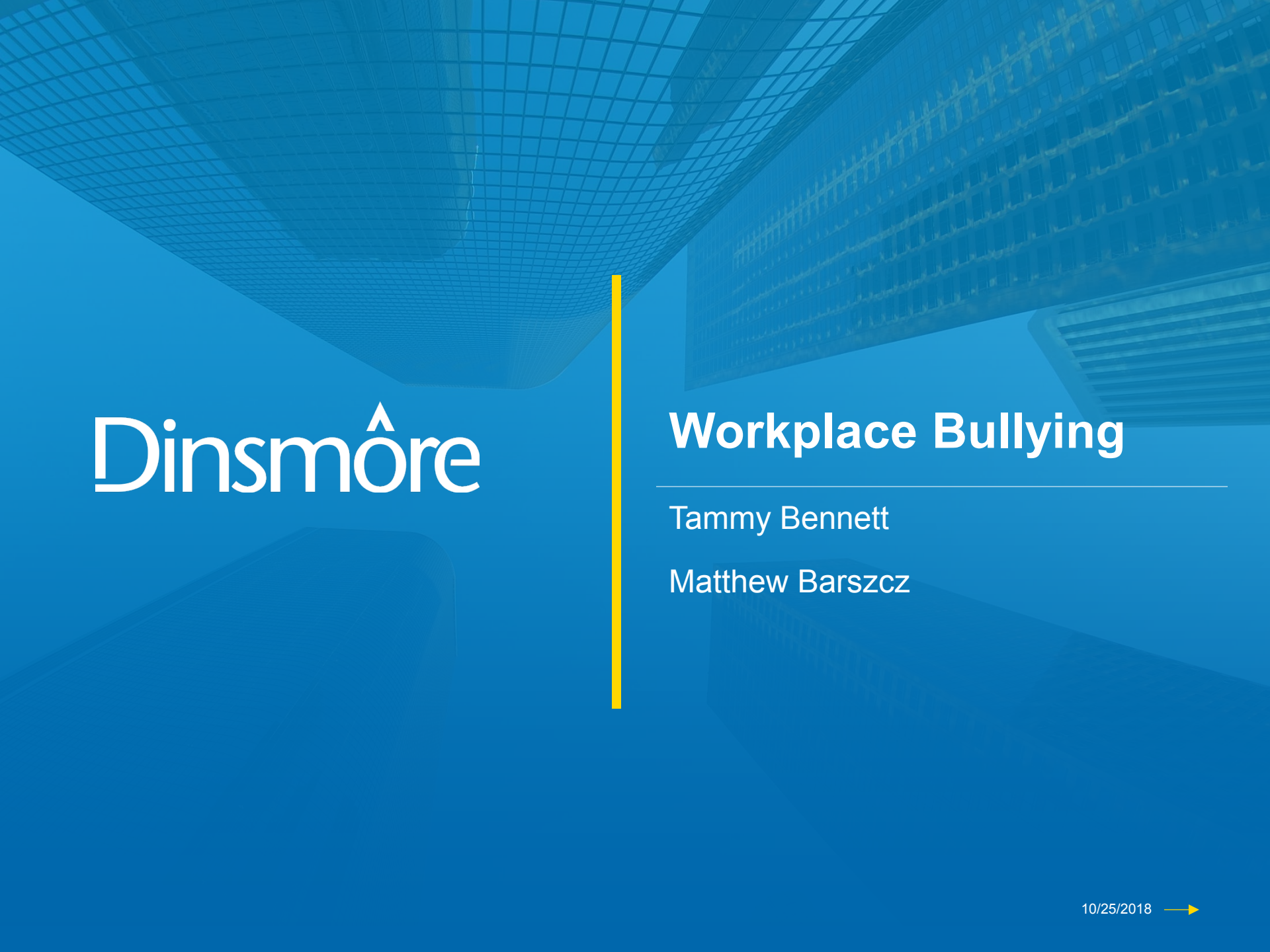




Dinsmôre

Workplace Bullying

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The Ticking Time Bomb



Definition of Workplace Bullying

Workplace Bullying* is 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

***As defined by the Workforce Bullying Institute**

Prevalence of Workplace Bullying

- 19% of Americans are bullied, another 19% witness it
- 61% of Americans are aware of abusive conduct in the workplace
- 60.4 million Americans are affected by it
- 70% of perpetrators are men; 60% of targets are women
- Hispanics are the most frequently bullied race (ethnicity)
- 61% of bullies are bosses, the majority (63%) operate alone
- 40% of bullied targets are believed to suffer adverse health effects
- 29% of targets remain silent about their experiences
- 71% of employer reactions are harmful to targets
- 60% of coworker reactions are harmful to targets
- To stop it, 65% of targets lose their original jobs
- 77% of Americans support enacting a new law

Prevalence of Workplace Bullying

According to the WBI, status-blind workplace bullying is more common than status-specific harassment.

It is repeated, hurtful, deliberate and driven by the desire to control or dominate.

Bullying , or abusive, behavior may exist at any level in the organization.

Bullies can be executives, supervisors or co-workers.

Bullies can also be third parties.

Types of Bullying

Direct

- Verbal abuse
- Physical interactions

Indirect

- Spreading rumors or lies

Internet or Cyber Bullying

- Sharing inappropriate pictures of someone
- Posing as someone else to spread rumors or lies
- Sending harassing messages or emails



Examples of Workplace Bullying

- **Yelling, shouting, insults, offensive language**
- **Constant and unfair criticism**
- **Unwanted physical touching**
- **Unwanted sexual advances**
- **Assigning less-desirable tasks to a single employee**
- **Threats, intimidation, or violence**
- **Gossiping or spreading rumors about employees**
- **Horseplay**
- **Use of technology for bullying, sending aggressive emails, texts or notes**
- **Intimidating or undermining employees by demeaning their work standards, not giving them credit, setting them up for failure and constantly reminding them of old mistakes**
- **Blaming without factual justifications**
- **Hostile glares and other intimidating gestures**

More Examples of Workplace Bullying

- Isolation, ostracism, or being left out of work-related events
- Being given the “silent treatment”
- Being berated or put-down about perceived lack of intelligence or competence
- Having contributions or communications ignored
- Interference with or sabotage of work
- Receiving mean pranks
- Tampering with personal effects or work equipment
- Undermining performance, withholding critical information or intentionally furnishing inaccurate information
- Unwarranted isolation from normal work interactions, development or career opportunities
- Giving impossible deadlines, creating undue pressure and stress
- Threatening employee’s personal self-esteem and work status
- Engaging in excessive social bantering, teasing and humiliation
- Monitoring excessively

What bullying is NOT

Expressing differences of opinion

Helpful critiques of work or constructive feedback

Legitimate management actions, such as:

- Discipline for conduct and/or performance
- Work distribution and deadlines
- Coaching and counseling
- Providing work instructions and supervising work

Workplace Bullying

Workplace bullying can negatively impact numerous aspects of an employer's operations:

- **Loss of good workers**
- **Absenteeism**
- **Low production**
- **Employee Complaints**
- **Client complaints**
- **Negative publicity**
- **Violence in the Workplace**

Barriers to Managing Workplace Bullying

- **Lack of awareness of behaviors**
- **Sensitivities in reporting incidents**
- **Desensitized by media and other societal factors**
- **Peer pressure**
- **Stereotypical responses**

Difference Between Bullying and Harassment

- Behaviors are the same, legal remedies differ.
- Bullying is not tied to a statutorily protected category.
- Most victims of “status blind” bullying are in a protected class.

Legal Horizon for Workplace Bullying

Currently no state or federal law provides for a private cause of action for workplace bullying

3 states have enacted anti-bullying laws that create a requirement for rulemaking and/or training

- ⇒ **California**
- ⇒ **Tennessee**
- ⇒ **Utah**

28 other states have considered legislation concerning workplace bullying but have not yet enacted any laws concerning this issue

“Healthy Workplace Bill”

Proposed legislation that would prohibit employers from maintaining an “abusive work environment”

Provides a legal remedy for employees who are subject to health harming cruelty at work

Employee required to provide proof of health harm by a licensed health or mental health professional

The bully can be individually liable

Holds the employer accountable for workplace bullying

Potential Liability for Workplace Bullying

Tort claims:

Intentional/negligent infliction of emotional distress

Negligent hiring/supervision/retention

Assault/battery

Workers' compensation claims

Contractual claims:

Implied contract

Promissory estoppel

Discrimination claims

Retaliation claims

OSHA

Potential Liability for Workplace Bullying

Bullying may not be based on any sort of protected class but may still serve as the basis for a claim of hostile work environment if the target of the bullying is a member of a protected class

Bullying can also serve as the basis for a same-sex sexually hostile work environment claim

May also serve as the basis for a claim of retaliation if the target of the bullying engaged in statutorily protected activity

***E.E.O.C. v. Nat'l Educ. Ass'n,*
422 F.3d 840 (9th Cir. 2005).**

Female employees alleged their male supervisor consistently bullied them but not male employees

Conduct included rude, insensitive language and comments as well as excessive monitoring and physical intimidation directed at female employees

The court held that there was sufficient evidence of discrimination on the basis of sex because, even though there was nothing overtly sexual about the conduct at issue, this was a situation where “an abusive bully takes advantage of a traditionally female workplace because he is more comfortable when bullying women than when bullying men”

***Alhallaq v. Radha Somi Trading, LLC*, 484 Fed. Appx. 293 (11th Cir. 2012).**

Muslim employee complained about workplace harassment:

Co-workers constantly played Christian gospel music

Co-worker called her dirty

Co-worker told her to “go to Hell” and “burn in Hell”

***Alhallaq v. Radha Somi Trading, LLC*, 484 Fed. Appx. 293 (11th Cir. 2012).**

Complaint dismissed because there was no plausible allegation that this conduct was done on account of employee's Muslim religion.

Bullying that occurs outside the workplace can create employer liability

“An employer is not liable for the harassment or other unlawful conduct perpetrated by a non-supervisory employee after work hours and away from the workplace setting. However, when an employee is forced to work for, or in close proximity to, someone who is harassing her outside the workplace, the employee may reasonably perceive the work environment to be hostile.”

Duggins v. Steak N’ Shake, Inc., 3 Fed. Appx. 302 (6th Cir. 2001).

Bullying and Stereotyping

Bruce v. Levy Premium Foodservices Ltd. Partnership (Mid. Tenn. 2018).

Bruce complained that she witnessed a male employee sexually harass another female employee

Bruce was later fired after a series of complaints about her bullying other employees

Bruce filed suit alleging retaliation and the employer defended by arguing it fired Bruce because she was bullying others

The Court said that the “bullying” Bruce had engaged in “could be interpreted as perpetuating gender stereotypes about women, specifically that Bruce was forward and assertive with her coworkers”

Preventing Workplace Bullying

What does your employee handbook say?

- Policy should clearly define the prohibited conduct
- Policy should encourage employees to report complaints of workplace bullying
- Policy should provide an avenue for employees to report complaints of workplace bullying
- Policy should prohibit retaliation against any employee who reports complaints of workplace bullying

Preventing Workplace Bullying

Train supervisors and managers on the anti-bullying policy

- This should be done at the time of hiring or promotion to a supervisory role
- This should also be done periodically with all managers and supervisors
- Focus on creating and sustaining a respectful workplace
- Create an environment of open communication
- Avoid stereotyping
- Avoid favoritism
- Model acceptable behavior

Preventing Workplace Bullying

Train employees on the anti-bullying policy and how to report bullying

- This should be done at the time of hiring as part of on-boarding
- This should also be done periodically with all employees
- Be able to demonstrate that employees received the anti-bullying policy

Preventing Workplace Bullying

Consistently enforce the anti-bullying policy

- Be vigilant in addressing bullying behaviors
- Investigate any complaints immediately or as soon as possible
- Document any investigations with notes about who was interviewed, what each participant said, and any documents or materials that were reviewed or discussed

Preventing Workplace Bullying

Do not promise to keep things confidential

- Requiring employees not to discuss bullying, harassment, or other workplace conduct may violate employees' rights under § 7 of the National Labor Relations Act
- Employees may indicate that they “don’t want to make a big deal” out of something and request that no investigation or discipline be issued
 - ⇒ Do not agree to this

Preventing Workplace Bullying

Take appropriate measures if bullying is substantiated

- Measures should be specific to the circumstances at issue
- Document the measures taken and the reasons why the measures were taken



Workplace Investigations

Be Responsive

Employers should take care to promptly, thoroughly, and effectively address every complaint or report.

Provide Interim Protection

One consideration should be if immediate measures should be taken to protect the employee from the accused.

This may include separating the employee from the accused by scheduling them on different shifts or in different locations, or even a temporary leave.

Create a Plan for the Investigation

Ensure you understand the issues in the complaint;
Outline of the Issue;
Development of Witness List;
Source of Information or Evidence;
Targeted Interview Questions for Each Witness;
Process for retaining documentation (e.g. notes and emails)

Conduct the Investigation

- Investigator should inform all parties involved of the need for an investigation and explain the investigation process.

Make a Decision

- Once witnesses have been interviewed and evidence has been collected, the investigator must make a determination of credibility.
- The investigator should evaluate all evidence and make a written formal recommendation.
- The investigator or non-biased member of management, as well as legal counsel, should make the final determination of any employment actions that are warranted based on the investigator's report.

Closing of Investigation

- **Once a decision is made, the employer should notify both the complaining employee and the accused of the outcome. It is important to let both parties know that organization took the complaint seriously and took appropriate action.**
- **The organization should ensure the complainant feels they were properly heard and understood, even if they do not agree with the outcome of the investigation.**
- **The investigator should set-up a timeline to check in with the complainant to determine if there are any follow-up issues and see if they are settling back into the work environment.**
- **The employer should determine if any follow-up training is needed, if workplace policies should be revised, and if the complaining procedures was effective.**

Develop Written Summary of Investigation Results

- The organization should develop a final report.
- The organization should keep a clear paper trail of evidence, such as documents of previous employee behavior and incidents.
- The investigator should have a clear records of all steps taken, including interview and investigation notes and dates, and outcomes.
- Employers should be aware all of these documents could be used in court.



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