VOLUME 74 ◆ NUMBER 8

Employee Benefit Plan Review

After Historic Supreme Court Ruling, Is Workplace Bullying Next?

PAUL H. SINCLAIR

The U.S. Supreme Court issued its historic ruling in *Bostock v. Clayton County* last term holding that federal employment laws prohibit employment discrimination against people because of their sexual orientation or gender identity. Is it possible that this landmark case may breathe new life into efforts to stop all forms of workplace bullying?

Background

The named plaintiff in this important Supreme Court case, Gerald Bostock, was allegedly fired because he was gay. Bostock began working for Clayton County, Georgia, as a child welfare services coordinator in 2003. During his 10-year career with Clayton County, Bostock received many positive performance evaluations and numerous accolades for his work.

In 2013, Bostock expressed interest in participating in a gay recreational softball league. That is when he said things changed for him at work.

Shortly after Bostock started playing in the gay softball league, Bostock started to receive criticism for his decision to participate in the league. He was also mocked for his sexual orientation and identity generally. One example was that Bostock said during a meeting in which his supervisor was present, at least one individual openly made disparaging remarks about Bostock's sexual orientation and his participation in the gay softball league.

Shortly afterward, Clayton County terminated Bostock for "conduct unbecoming of its employees."

The Supreme Court's Decision

According to the Supreme Court, the alleged behavior on the part of management and coworkers fit squarely into the category of discriminatory treatment and, if true, was a violation of civil rights laws. Bostock's experiences also sound remarkably like the kinds of allegations associated with other forms of workplace bullying.

The Healthy Workplace Campaign, an organization that promotes anti-bullying legislation, defines workplace bullying as, "repeated, health-harming mistreatment of one or more persons (the targets) by one or more perpetrators . . . that takes one or more of the following forms: verbal abuse, or threatening, intimidating or humiliating behaviors (including nonverbal), or work interference . . . which prevents work from getting done, or some combination of one or more."

There are no specific federal laws which specifically prohibit bullying. In fact, more than two decades ago, the Supreme Court held that federal employment discrimination laws are not intended to create "a general civility code for the American workplace."[1]

In addition, only a handful of states have enacted laws that prohibit some forms of workplace bullying. Workplace bullying legislation has been introduced in 30 states, but so far, it has failed to gain much support. Tennessee's Healthy Workplace Act, California's Fair Employment and Housing Act, and Utah's State Personnel Management Act are the limited exceptions.

Most versions of state anti-bullying legislation mirror existing federal civil rights laws, giving bullied employees a right to sue their employers seeking damages and

attorneys' fees. Interestingly, some versions of the legislation also provide for the removal of the identified bully or bullies from the workplace. Most versions of the legislation also provide a defense for employers who actively work to eliminate and respond to bullying in the workplace.

Is Workplace Bullying Next?

Could the Supreme Court's ruling in *Bostock* reinvigorate the efforts to eradicate all forms of workplace bullying? One portion of the Supreme Court opinion gives some indication that the tide may be turning in that direction. In the Court's discussion of employer liability for workplace discrimination, Justice Gorsuch used the following example:

> So an employer who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine may treat men and women as groups more or less equally. But in both cases the employer fires an individual in part because of sex. Instead of avoiding Title VII exposure, this employer doubles it.[2]

This subtle but important example seems to be sending a message to employers not only about liability for discrimination, but also about retaining abusive employees in the workplace. The Supreme Court's commentary undercuts what has become known as the "equal opportunity harasser" defense – a defense that has been used to avoid liability for the actions of workplace bullies. The "equal opportunity harasser" analysis essentially holds that an employer is not liable for the actions of its employees who engage in abusive behavior against many different kinds of people, but not because of any particular, protected class or status. Some employers have prevailed in court by arguing that the victim of such abuse was not subjected to "illegal" mistreatment based on a protected class or status, but instead was treated poorly by someone who was a bully to everyone.

For example, the U.S. Court of Appeals for the Seventh Circuit (which includes Indiana, Illinois and Wisconsin) upheld a ruling in favor of an employer when the evidence showed that the alleged harasser was an "equal opportunity bully," harassing people without regard to any protected class or status.[3]

Similarly, a federal court in Kentucky ruled in favor of an employer on a gender harassment claim because a manager's bullying behaviors, which included screaming, swearing, throwing objects and threatening physical harm, were directed at all employees, not specifically at women.[4]

The Supreme Court's example in *Bostock* seems to undermine the reasoning used by these courts which have ruled in favor of employers who had bullies in their workplaces. The Supreme Court implies that employers who do not protect their workforce from "equal opportunity harassers" will not avoid liability, but instead they may "double it."

While the *Bostock* ruling does not specifically open the door to lawsuits under federal law for general workplace bullying (the abuse still has to somehow be connected to a protected status), it certainly seems to undermine existing employer protections for some forms of workplace bullying. The ruling may also shine a light on legislative efforts to provide even broader protections to victims of such bullying. *Bostock* may be the death of the "equal opportunity harasser" defense and may also be the re-birth of workplace bullying litigation and legislation.

Conclusion

No employer would ever actively condone an abusive workplace. However, the *Bostock* case is a reminder of the importance that policies, practices, training, and culture play in maintaining a diverse and productive work environment, free of any form of hostile treatment, whether it is illegal or just bad human relations.

Notes

1. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).
2. 590 U. S. ___ 2020) (*slip opinion* at 8-9); *https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf*.
3. *Yancick v. Hanna Steel Corp.*, 653 F.3d 532, 534, 546 (7th Cir. 2011).
4. *Street v. U.S. Corrugated, Inc.*, 2011 WL 304568 (W.D. Ky. Jan. 25, 2011).

Paul H. Sinclair, a partner in the Labor and Employment Group of Ice Miller LLP, has a primary practice concentration in labor and employment law. Resident in the firm's office in Indianapolis, Mr. Sinclair may be contacted at *paul.sinclair@icemiller.com*.