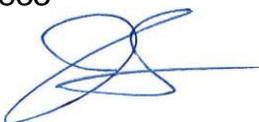


## Memorandum

**To:** Marley Hart, Executive Officer  
Occupational Safety and Health Standards Board  
2520 Venture Oaks Way, Suite 350  
Sacramento, CA 95833

**Date:** June 23, 2015

**From:** Juliann Sum, Chief



**Subject:** Division Evaluation of Petition 547 from Robert Jungers

This memorandum is written in response to your request for Division review of Petition 547, which requests that the Board adopt a workplace safety standard to address workplace bullying. The petitioner states, "The workplace bullying and mobbing issue is very old and I've seen it all my life. It's my understanding that rules like I'm proposing have been in place for about 20 years in other countries." The petitioner refers to the State of Massachusetts Healthy Workplace Bill as a model for California.

Labor Code section 142.2 permits interested persons to propose new or revised standards concerning occupational safety and health, and requires the Board to consider such proposals and render a decision no later than six months following receipt. Any proposed occupational safety or health standard received by the Board from a source other than the Division must be referred to the Division for evaluation. Labor Code section 147 requires the Division to submit a report on the proposal within 60 days after receipt of the petition. The Division received Petition 547 on April 24, 2015.

### Related Statutes, Regulations, Legislation, and Guidance

#### 1. California Civil Code – Protection from Hate Violence

Civil Code section 51.7 (the Ralph Civil Rights Act) protects persons against hate violence by prohibiting violence or intimidation by threat of violence because of the person's race, color, religion, ancestry, age, disability, sex, sexual orientation, political affiliation, or position in a labor dispute, or because another person perceives the person to have one or more of those characteristics. Under Government Code section 12930, persons who are subjected to hate violence may file a complaint with the Department of Fair Employment and Housing (DFEH), which has the authority to prosecute the complaint in civil court. These persons may also file a private lawsuit against the offending party. (See DFEH website: [http://www.dfeh.ca.gov/Publications\\_RalphDescr.htm](http://www.dfeh.ca.gov/Publications_RalphDescr.htm).)

## **2. California Government Code – Supervisory Training on Abusive Conduct**

Government Code section 12950.1 requires any employer having 50 or more employees to provide at least two hours of effective interactive training every two years to all supervisory employees regarding the prevention of sexual harassment and abusive conduct. “Abusive conduct” is defined as, “conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer’s legitimate business interests. Abusive conduct may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person’s work performance. A single act shall not constitute abusive conduct, unless especially severe and egregious.”

The requirement to train on the prevention of abusive conduct was added to section 12950.1 by Assembly Bill 2053 (2014). A review of the Legislative Committee reports regarding AB 2053 shows that the intent of the bill was to reduce the incidence of workplace bullying.

Section 12950.1 may be enforced by DFEH. (See Legislative Counsel website: [http://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml?lawCode=GOV&sectionNum=12950.1](http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=GOV&sectionNum=12950.1).)

## **3. California Code of Civil Procedure – Protection from Harassment and Workplace Violence**

Code of Civil Procedure section 527.6 protects persons against harassment, which is defined as, “unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose.” Persons who are subjected to harassment as defined in section 527.6 may file an action in civil court to obtain a temporary restraining order and injunction against the harassing party.

(See Legislative Counsel website: [http://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml?lawCode=CCP&sectionNum=527.6](http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CCP&sectionNum=527.6).)

Code of Civil Procedure section 527.8 protects employees against unlawful violence or a credible threat of violence in the workplace. Employers of employees who are subjected to unlawful violence or a credible threat of violence as defined in section 527.8 may file an action in civil court to obtain a temporary restraining order and injunction against the offending party. (See Legislative Counsel website: [http://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml?lawCode=CCP&sectionNum=527.8](http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CCP&sectionNum=527.8).)

#### **4. California Government Code – Fair Employment**

Government Code sections 12940-12951 and 12960-12976 protect employees from discrimination based on the person's race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status. Employees who are subjected to discrimination under these fair employment laws may file a complaint with the DFEH, which has the authority to prosecute the complaint in civil court. Employees may also file a private lawsuit against the offending party. (See Legislative Counsel website:

[http://leginfo.legislature.ca.gov/faces/codes\\_displayText.xhtml?lawCode=GOV&division=3.&title=2.&part=2.8.&chapter=6.&article=1](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=GOV&division=3.&title=2.&part=2.8.&chapter=6.&article=1) and  
[http://leginfo.legislature.ca.gov/faces/codes\\_displayText.xhtml?lawCode=GOV&division=3.&title=2.&part=2.8.&chapter=7.&article=1](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=GOV&division=3.&title=2.&part=2.8.&chapter=7.&article=1))

#### **5. California Labor Code – Protection from Discrimination in Employment**

Labor Code section 98.7 protects employees from discrimination in violation of laws under the jurisdiction of the California Labor Commissioner, including Labor Code section 6310, which prohibits employers from discriminating against employees for exercising their right to a safe and healthy workplace. Persons who are subjected to discrimination under section 98.7 may file a complaint with the Division of Labor Standards Enforcement, which has the authority to investigate the complaint, hold an investigatory hearing, and determine whether a violation occurred. (See Legislative Counsel website:

[http://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml?lawCode=LAB&sectionNum=98.7](http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=LAB&sectionNum=98.7).)

Labor Code section 132a protects employees from discrimination for having a work-related injury or filing a workers' compensation claim. Employees who are subjected to discrimination under section 132a may file an application for adjudication with the Division of Workers' Compensation, which has the authority to award increased workers' compensation benefits and order other remedies. (See Legislative Counsel website:

[http://leginfo.legislature.ca.gov/faces/codes\\_displayText.xhtml?lawCode=LAB&division=1.&title=&part=&chapter=5.&article](http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=LAB&division=1.&title=&part=&chapter=5.&article).)

#### **6. Occupational Safety and Health Regulations Related to Workplace Bullying**

No occupational safety or health regulation in title 8 of the California Code of Regulations expressly covers workplace bullying.

From September 10, 2014, to April 1, 2015, the Division held a series of pre-rulemaking advisory meetings to obtain input for a new standard to prevent

workplace violence in the health care industry, in response to two petitions granted by the Standards Board in July 2014 (Petitions 538 and 539) and Senate Bill 1299 (filed in September 2014). The Division is proposing that the standard include prevention of Type 3 violence (i.e., workplace violence against an employee by a present or former employee, supervisor, or manager). Similar coverage will also be considered in response to a petition for a new standard to prevent workplace violence in all industries (Petition 542). However, although workplace bullying was discussed in the advisory meetings for the health care industry, the Division is not proposing that workplace bullying be covered by either standard.

No federal occupational safety or health regulation in title 29 of the Code of Federal Regulations expressly covers workplace bullying.

## **7. Federal OSHA Guidance on Investigating Workplace Violence, But Not Intimidation or Bullying**

OSHA has issued a directive instructing its own compliance officers to refer complaints of workplace bullying to other governmental entities. The directive, "Enforcement Procedures for Investigating or Inspecting Workplace Violence" (2011), states, "An inspection generally shall not be considered in response to coworker or personal threats of violence. If an Area Director becomes aware of instances that could be classified as intimidation or bullying, they should consider referring the issue to the appropriate government entity. Referrals could be made to the local police department, the Equal Employment Opportunity Commission, the National Labor Relations Board or OSHA's Office of Whistleblower Protection." (See OSHA website: [https://www.osha.gov/OshDoc/Directive\\_pdf/CPL\\_02-01-052.pdf](https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-01-052.pdf).)

## **8. Massachusetts Legislation – "Healthy Workplace Bill"**

House Bill No. 1771 of the Commonwealth of Massachusetts ("An Act addressing bullying, mobbing, and harassment, without regard to protected class status") has been introduced to protect mistreated employees who are subjected to abusive treatment at work but cannot establish that the behavior is motivated by race, color, sex, sexual orientation, national origin, or age. Section 8 of the bill states that enforcement would be solely by private right of action. As of the date of this memorandum, the bill is in a legislative committee. (See Massachusetts Legislature website: <https://malegislature.gov/Bills/189/House/H1771>.)

## **Discussion**

The petitioner lists the following as “common bullying behaviors”:

- False accusations of mistakes and errors
- Yelling, shouting, and screaming
- Exclusion and "the silent treatment"
- Withholding resources and information necessary to do the job
- Behind-the-back sabotage and defamation
- Use of put-downs, insults, and excessively harsh criticism
- Unreasonably heavy work demands

### ***Bullying would be difficult to define in concrete terms, for all situations***

Many of the behaviors listed by the petitioner fall along a continuum, making it difficult to define bullying in such a way that one could objectively and consistently draw the line between bullying and non-bullying behaviors in all situations. For example:

1. How could behaviors experienced by some employees as put-downs, insults, and excessively harsh criticism be distinguished objectively from actions that others regard as necessary work instructions and performance appraisals?
2. How could behaviors experienced by some employees as “the silent treatment” or the withholding of necessary information be distinguished objectively from not disclosing information that others regard as confidential or irrelevant?
3. How could unreasonably heavy work demands be distinguished objectively from work assignments that are reasonable and necessary for business purposes?

### ***Verifying that bullying occurred would require subjective judgment***

Other behaviors on the petitioner’s list relate to a coworker making false statements (i.e., “false accusations of mistakes and errors” and “defamation”). Determining whether a coworker’s statement was false would require weighing and judging the credibility of the complainant and the coworker.

### ***Behaviors related to bullying are addressed by other governmental bodies through discovery of evidence, hearings, and legal decisions***

Existing statutes (discussed above) govern behaviors that are related to bullying: hate violence, harassment, workplace violence, unfair employment practices, and discrimination. Under those statutes, hearing officers, administrative law judges, and court judges are authorized to oversee the discovery of evidence and conduct hearings to consider the evidence and the credibility of the parties. Hearings are a fundamental part of procedural due process in US law. The hearing officers and judges then identify violations and issue decisions based on the parties’ arguments and the evidence presented. Because the facts of every case are different and not subject to specific, bright-line rules, the statutes discussed above are principle-based, and the opinions,

judgments, and decisions issued by the hearing officers and judges are legally reasoned, based on comparisons to prior opinions and decisions.

Similarly, the Massachusetts “Health Workplace Bill,” referenced by the petitioner as a model for California, contemplates enforcement solely through private lawsuits filed in civil court. If that bill passes as currently written, workplace bullying problems would be remedied through court decisions, and plaintiffs may be awarded damages or other remedies as appropriate.

***The Division is not authorized to conduct hearings to determine whether an employer should be cited for violating a safety or health regulation***

The Division is authorized to enforce “effective standards” adopted by the Board (Labor Code sections 142.3 and 6300). Division compliance inspectors identify violations and issue citations by applying those standards technically and objectively (Labor Code section 6317). The Division is required to substantiate each element of a violation with supporting, objective evidence. A record of every citation that the Division issues to an employer is posted online at the federal OSHA website, regardless of whether the citation is later dismissed or upheld on appeal. Unlike the other agencies and courts discussed above, the Division is not authorized by any statute to hold hearings to consider the unique facts and arguments of the parties involved in a dispute in order to determine whether an employer should be cited for an alleged violation of a safety or health standard. (Although the Occupational Safety and Health Appeals Board holds hearings to consider employers’ appeals of citations, the Division is not authorized to do so at the initial stage of issuing a citation.)

## **Conclusion**

The Division acknowledges that workplace bullying can cause workers to experience stress and health problems, sometimes serious. However, the behaviors that the petitioner requests be regulated by the Board and the Division do not lend themselves to objective standards that can clearly distinguish bullying from non-bullying behaviors in all cases, for all employees and employers in all settings.

Other agencies and courts are authorized by statute to use a more subjective process to protect employees from behaviors that are related to bullying (hate violence, harassment, workplace violence, unfair employment practices, and discrimination). Those statutes provide for in-depth investigations, discovery of evidence, hearings, and resolution of complaints through legally-reasoned opinions, judgments, and decisions that compare prior cases to the current dispute. The Division is not authorized to use such a process.

If the Board and the Division were to attempt to create a principle-based regulation that gives Division compliance officers the discretion to identify workplace bullying

behaviors and issue citations for alleged violations based on their personal judgment, the regulation would probably be rejected by Office of Administrative Law as lacking sufficient clarity.

The Division therefore recommends that the petition be denied.

cc: Christine Baker  
Eric Berg  
Steve Smith  
Kevin Graulich