

Member vs. Member: Harassment and Bullying in the (Orchestral) Workplace

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Heard by every Orchestra Committee:

- "He/she is harassing me!"
- "He/she is creating a hostile work environment!"

"DO SOMETHING!"

“Harass”: dictionary definition

- Merriam-Webster: to annoy persistently; to create an unpleasant or hostile situation for especially by uninvited and unwelcome verbal or physical conduct
- Dictionary.com: to disturb persistently; torment, as with troubles or cares; bother continually; pester; persecute

“Harass”: legal term of art

- the victim must be a member of a “protected class” (e.g., race, religion, gender, national origin); and
- the acts complained of must be “because” the victim was a member of the class. (In other words, must show discriminatory motivation, either directly or circumstantially)

There is no free-standing prohibition on “harassing behavior”

“Hostile”: dictionary definition

- Merriam-Webster: marked by malevolence; having or showing unfriendly feelings; having an intimidating, antagonistic, or offensive nature
- Dictionary.com: opposed in feeling, action, or character; antagonistic; not friendly, warm, or generous; not hospitable

“Hostile Work Environment”: legal term of art, requires acts or conduct that –

- is subjectively and objectively hostile
- constitutes severe and pervasive harassment – isolated incidents are insufficient (also, courts look at the nature of the workplace)
- is based on membership in the protected class (comments not relating to sex or gender generally will not be sexual or gender harassment)

The point:

- Terms like “harassment” and “hostile work environment” don’t mean what most people (understandably) think; and
- the law regarding “harassment” and “hostile work environment” doesn’t protect against a wide swath of “harassing” and “hostile” behavior.

Enter “bullying”

Law of Bullying

- Federal level: none (unlikely in the near future).
- State level
 - Model law: “Healthy Workplace Bill”
 - Introduced in 31 legislatures (usually by Dems)
 - None has passed the bill in its entirety (yet)

Typical elements of Anti-bullying legislation

- Makes it an unlawful employment practice to “subject an employee to an abusive work environment.”
- “abusive work environment”: workplace where an employee is subjected to “abusive conduct” that is so severe that it causes physical or psychological harm

“Abusive Conduct”

- acts, omissions, or both, that a **reasonable person would find abusive**, based on the severity, nature and frequency of the conduct, including, but not limited to: repeated **verbal abuse** such as the use of **derogatory remarks, insults and epithets**; verbal, nonverbal or physical conduct of a **threatening, intimidating or humiliating** nature; or the **sabotage or undermining** of an employee's work performance. It shall be considered an aggravating factor if the conduct **exploited an employee's known psychological or physical illness or disability**. A single act normally shall not constitute abusive conduct, but an especially severe and egregious act may meet this standard.

California: training requirement

- Employer with 50 or more employees must provide at least two hours of classroom or other interactive training and education “to all supervisory employees”
- Previously required for sexual harassment; now, the training “shall also include prevention of abusive conduct”
- uses the definition of “abusive conduct” from the Healthy Workplace Bill
- “supervisory employees” – beware

Why the resistance?

- “This country was built by mean, aggressive, sons of bitches”
- “Some people may need a little appropriate bullying in order to do a good job”
- “Those who claim to be bullied are really just wimps who can't handle a little constructive criticism”
- *Source: Evil management attorney*





Why do we tolerate bullying in music?

- Two notions:
 - if you play/teach/conduct well enough, your behavior doesn't matter
 - all that matters is the performance

Bullying policies: must be bargained for

- Terms and conditions of employment must be bargained
- An employer rule, the violation of which could lead to discipline or discharge, necessarily is a term or condition of employment and must be bargained for.
- Exception: if there has been a “clear and unmistakable” waiver by the Union.
 - Note: most “management rights” clauses are not specific enough to constitute a waiver.

What if it is a really worthwhile policy?

- “We agree . . . as to the importance of the public policy in question. However, we perceive no affront to that public policy by virtue of our requirement that the [employer] first bargain with the Union if it wishes to pursue the laudable goal of promulgating a policy of its own against these forms of harassment, by implementing a new work rule prohibiting them.”
-*Bridgestone/Firestone, Inc.*, 337 N.L.R.B. 133 (2001)

Typical Workplace Anti-bullying Policy

- treat all employees with courtesy and respect at all times
- maintain a positive work environment
- communicate in a manner that is conducive to harmonious working relationships
- don't make insulting, disparaging, negative or otherwise hostile comments
- avoid starting or perpetuating rumors, false statements or gossip

Section 7 rights

- all employees (not just unionized employees) have the right not only to organize, but “to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”
- So, a work rule or policy issued by an employer is unlawful if it “reasonably tends to chill employees in the exercise of their Section 7 rights.”
- “tends to chill”: if employees “would reasonably construe the rule’s language to prohibit Section 7 activity.”

“Respect”

- Rule: “treat all employees with courtesy and respect at all times”
- NLRB:
 - Objecting to conditions, pay, or supervisor conduct is inherently “disrespectful” – and thus protected.
 - But, a rule requiring employees to be “respectful” to customers and coworkers only is permissible.

“Positive Work environment”

- Rule: “maintain a positive work environment” . . .
“communicate in a manner that is conducive to harmonious working relationships”
- NLRB
 - Conflicts and disagreements between coworkers and between employees and management will not always be “harmonious”
 - Employees might avoid controversial or contentious communications or discussions, out of fear they are inconsistent with a “positive” environment and “harmonious” relationships.

“Disparaging”

- Rule: “don’t make insulting, disparaging, negative or otherwise hostile comments ”
- NLRB:
 - Too sweeping. (“Negative” is even broader than “disrespectful”)
 - Prohibition of “disparaging” comments would restrict protest or criticism of management and working conditions.

Lies and Gossip

- Rule: “avoid starting or perpetuating rumors, false statements or gossip”
- NLRB
 - Only malicious “false statements” can be prohibited.

Prohibition of “gossip” standing alone has been ruled permissible; but in context of the entire rule this is likely impermissible

So, we can fight it . . . but should we?

- Bullying from above
 - Conductors
 - Teachers
 - Principals
- Why not hold them to the same standards?
- *Believe it or not, it is possible to work with management to craft a policy that contributes to a healthier workplace – yet isn't unduly restrictive*

Which path will we take?

- acts, omissions, or both, that a **reasonable person would find abusive**, based on the severity, nature and frequency of the conduct, including, but not limited to: repeated **verbal abuse** such as the use of **derogatory remarks, insults and epithets**; verbal, nonverbal or physical conduct of a **threatening, intimidating or humiliating** nature; or the **sabotage or undermining** of an employee's work performance

OR

- “Some people may need a little appropriate bullying in order to do a good job”
- “Those who claim to be bullied are really just wimps who can't handle a little constructive criticism”

Member vs. Member: “Do something!”

- Law: Union “must do its best to fairly represent all of its members, ***even when the success of one necessarily requires the failure of another.***”
- member vs. member: Union must represent the interests of both members – can’t pick a side and simply decline to represent the other
- must give fair consideration to the interests of both the accuser and the accused

Judgment calls

- DFR: Union must act upon rational considerations, and not for arbitrary or capricious reasons, or in bad faith
- Union can make credibility determinations between members – but make a full investigation first!
- Tough cases: remain neutral and let an arbitrator decide.
- ***Union cannot impose discipline***

Question: has the CBA been violated?

- If there is no CBA language (or agreed-upon policy) prohibiting the behavior at issue, and nothing specific in the CBA or policy has been violated, and no discipline has been imposed: union's obligation ends
- If CBA or policy wasn't violated but discipline has been imposed on the accused: evaluate whether the discipline was nevertheless justified (just cause inquiry)

If the CBA or policy has been violated

. . . and management did not impose discipline: Union should evaluate whether to file a grievance over management's failure to act.

- Union's failure to make that evaluation might result in a DFR claim from the accuser

. . . and management did impose discipline: Union should evaluate (1) whether the discipline was too harsh for the accused; and (2) whether the discipline harsh enough for the accuser (!)

- Union's failure to make that evaluation might result in DFR claims from both the accused and the accuser

Principles to follow:

- always make an investigation
- always be as fair as possible to both members
- take action only in response to what management does
- evaluate the appropriateness of management's actions (or lack thereof) from each member's perspective separately.

Other approaches

- Informal conflict resolution at the Union (blessed are the peacemakers...)
- Union internal charges (hardly ever satisfying)