



STOP THE BULLYING!

HOW LOCAL 802 CAN TAKE A STEP TO ADDRESS WORKPLACE INTIMIDATION FOR MUSICIANS

By HARVEY MARS, ESQ.

NO WORKER SHOULD have to put up with bullying and intimidation – and that includes musicians. Recently, Local 802 members have taken the lead in addressing this issue. But as an attorney, I am keenly aware of the fact that the law has its limitations. There are many instances when I am compelled to advise clients that while the circumstances they may find themselves in are unfair, unwarranted and even immoral, there are no laws being violated by their employer

and thus no remedy to the injury they may have suffered. For instance, imagine a workplace that breaks no employment laws, but where people are treated disrespectfully or uncivilly. Unfortunately, case law makes it clear that federal anti-discrimination laws don't cover "civility." To put it plainly, disrespectful or bullying behavior that might be considered "uncivil" in a workplace is not the same as discrimination.

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating on the basis of sex, race, color, national origin and religion. The Supreme Court

has specifically said that Title VII is not a "general civility code for the American workplace." (See *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 1998.) Again, under current federal law, disrespectful or bullying behavior is not the same as illegal discrimination.

I was recently pursuing a workplace discrimination claim against an employer. The employer claimed that they weren't discriminating because they treat *all* of their employees poorly – regardless of their sex, race, color, national origin or religion! As the law is currently situated, such a defense can be successful.

But there's some good news. Where the law fails, unions can provide the necessary protections for employees both through collective bargaining and the development of internal union rules and policies. The Local 802 Theater Committee is attempting to do just that by developing a union bylaw amendment prohibiting workplace bullying and intimidation. In October, at the Local 802 fall membership meeting, musicians discussed workplace bullying and how it has affected them. (See story at right.) At the conclusion of the meeting, a draft of a bylaw proposal was present-

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ed by the Theatre Committee that will be developed further and placed before the membership at a later date. The bylaw was inspired by a provision in the Actors' Equity production contract with the Broadway League.

As I assisted the Theatre Committee in drafting the bylaw, I researched the issue and discovered that California, Utah and Tennessee have already enacted legislation to address workplace bullying. (The statutes in Utah and Tennessee regulate public employers only, while California's law addresses both private and public employers.) These laws define workplace bullying and create a requirement for training and rulemaking, much like the New York City sexual harassment legislation.

Separately, 26 states – including New York – have proposed anti-bullying laws to prohibit mistreatment in the workplace. These bills are all based upon model legislation proposed by the Healthy Workplace Campaign.

Under the Healthy Workplace model legislation, employers would be barred from subjecting employees to “an abu-

sive work environment.” That term is defined as an employment condition where an “employer or one or more employees, acting with intent to cause pain or distress to an employee, subjects an employee to abusive conduct that causes physical harm, psychological harm, or both.” It should be noted that workplace bullying and illegal discrimination often occur in tandem. However, workplace bullying encompasses a much broader range of conduct.

The Washington State Department of Labor & Industries has also developed guidelines to address workplace bullying, which they define as “repeated, unreasonable actions of individuals (or a group) directed towards an employee (or a group of employees), which are intended to intimidate, degrade, humiliate, or undermine, or create a risk to the health or safety of employee(s).” The guidelines provide these eight instructive examples of conduct that could be considered workplace bullying:

1. **Unwanted or invalid criticism**
2. **Blame without factual justification**

3. **Being treated differently than the rest of your work group**
4. **Being sworn at**
5. **Exclusion or social isolation**
6. **Being shouted at or humiliated**
7. **Excessive monitoring or micromanaging**
8. **Being given unrealistic deadlines**

It should be noted that the definition of bullying is not meant to bar an employer from leveling *warranted* criticism or meting out *justified* discipline.

While a bylaw amendment is a fine point of departure to address workplace bullying, it is not without limitations. A union bylaw provides a code of conduct for union members only; it cannot address actions perpetrated by *non-members*. Further, the penalties for violation of a bylaw involve fines and possible loss of union membership. Such penalties can serve as a deterrent in some circumstances – but not all. Finally, as a point of law, the union has an obligation to fully and fairly represent *all* of its members. Often, the union will have to represent both the accused

as well as the accuser. This limits the degree that a union can proactively involve itself in a conflict between members. Despite this, enactment of a bylaw is good place to start until state legislation is enacted.

The creation of this bylaw demonstrates how unions can progressively regulate work environments so that workers feel safe. Historically, many progressive pieces of legislation – like minimum wage and the 40-hour work week – can trace their roots to union activism. In this regard Local 802 is following a great historical example.

Harvey Mars is counsel to Local 802. Legal questions from members are welcome. E-mail them to HsmLaborLaw@HarveyMarsAttorney.com. Harvey Mars's previous articles in this series are archived at www.HarveyMarsAttorney.com. (Click on “Publications & Articles” from the top menu.) Nothing here or in previous articles should be construed as formal legal advice given in the context of an attorney-client relationship.

A report on the Oct. 24 membership meeting

By AUDREY FLORES and MARTHA HYDE

ON OCT. 24, Local 802 held its fall membership meeting. Instead of chairs set up in traditional rows, there were clusters set up under signs with months on them, with the purpose of encouraging roundtable-style peer group discussions in small groups. As musicians entered the room, they were directed to find their birthday months.

The topic was member-on-member workplace bullying and harassment. (See Harvey Mars' story on opposite page for more background.) A subcommittee of the Theater Committee

is working on a bylaw amendment to help clarify for Local 802 what role the union should play in fighting bullying and harassment. Local 802 often finds itself in the position of being the recipient of complaints – but is also obligated to represent both the accused and the accuser when both are members. The goal of this meeting was to introduce a bylaw amendment proposal, to hear from members what bullying looks like in their workplaces, and to better shape Local 802's definition.

After the topic was introduced, the people in the small discussion groups related their experiences and visualized what a healthier work-

place would look like. The groups then reported back to the large group. Themes that arose in the four groups were written on a projected screen. Musicians then anonymously wrote questions on cards which were then read aloud by a facilitator. Those questions were answered by Harvey Mars, members of the Trial Board, and members of the subcommittee working on the bylaw amendment.

Several big themes emerged, including the following: how victims feel isolated; fear of retribution from the accused and from other musicians caught in the crossfire; imbalances of power between conductors, regulars and subs; and a general feeling

that there should be a clear pathway for victims at Local 802. Some questions remain: how can anonymity be preserved when the workplaces are so small? How should Local 802 handle representing both the accuser and the accused? How does one define bullying without legal guidance in civil law?

About 60 people participated in the meeting. The subcommittee is working with the feedback and has decided to expand the project to include still more input. The bylaw proposal may be ready to come before the June membership meeting. This is the beginning of a much larger and longer conversation that Local 802 hopes to continue.

“Membership meetings provide a degree of transparency to the members. They’re a community place for our elected officials to directly hear our concerns, and are an important platform to exercise our rights as union members. At a recent Theatre Committee meeting, it came to light that an important bylaw amendment was being crafted. If the membership at large does not meet a quorum of attendance at membership meetings, our voting power will be forfeited and the Executive Board will be the only party responsible for enacting something that concerns all of us. I volunteered to help spread the word about the Oct. 24 membership meeting because I believe that these meetings are important platforms for union discussion and information, and are vital to the democratic nature of our union.” – Audrey Flores