Outlawing impolite behavior at work: an ominous trend

By Timothy P. Van Dyck & Timothy H. Powell

On any given workday, we all deal with a wide spectrum of human behavior. At one time or another, we have all been on the giving and receiving ends of idiosyncratic — even uncomfortable — workplace conduct.

A recent trend could create legal liability for such discourteous conduct in the workplace. In one instance, an influential legal organization has proposed amending the tort of battery to allow “unusually sensitive” workers to file suit when they find a particular type of contact to be offensive.

In another, several states are considering legislation that would make it unlawful to “bully” in the workplace.

The establishment of these novel areas of liability, while perhaps well-intentioned, will create a hornet’s nest for employers attempting to successfully manage their workforce.

‘Unusually sensitive’ employee

On May 20, the American Law Institute voted by a narrow margin to implement a significant change to its Restatement of the Law of Torts regarding the definition of “offensive contact” required for the tort of battery.

While the law traditionally required that a contact that causes no bodily harm must be offensive to a “reasonable” person’s sense of personal dignity to constitute a battery, the new restatement would add an entirely novel basis for liability: contact that is highly offensive to another’s “unusually sensitive sense of personal dignity,” where the actor “knows that the contact will be highly offensive to the other.”

The ALI considered and rejected a narrower approach imposing liability only when the defendant contacts the plaintiff for the very purpose of offending the plaintiff; instead, the restatement as adopted requires only that the defendant know that the conduct is offensive.

The ALI’s restatements, while themselves not binding law, are highly influential. In addition to attempting to codify the prevailing common law, the ALI also seeks to craft new law as it sees fit for its “better adaptation to social needs.”

The ALI’s new definition of battery unquestionably was adopted pursuant to that latter prerogative. The protection of individuals of “unusual sensitivity” from conduct that they perceive as highly offensive is not the prevailing law. In fact, as reported in a formal objection to the definition by two ALI members, “such a rule has been rejected by every court that has considered the question.”

Indeed, adoption of the ALI’s definition of battery inevitably would lead to a host of unintended consequences in the real world. Professor Ronald D. Rotunda, himself an ALI member, critiques the restatement in a June 22 Wall Street Journal opinion piece and provides the example of a patient who informs a hospital that, based on his own religious views, he does not want any doctors or nurses of a particular religion to touch him.

In that situation, the hospital is now caught between the proverbial rock and a hard place. On the one hand, if the hospital refuses to accede to the patient’s bigoted request, it risks a lawsuit from the patient for battery. If the hospital kowtows to the patient’s request, it risks a discrimination lawsuit from its doctors and nurses who otherwise might have provided medical care but now are forbidden from doing so because of their religion.

More absurd examples abound, with little imagination. It is not a stretch to see how behaviors that once were merely impolite or rude in the workplace now may expose employees, and their employers, to liability for battery.

The restatement defines “contact” very broadly to include not only the actual touching of the plaintiff’s person, but also causing any other object or substance to contact the plaintiff’s person. The restatement explicitly states that the act of an employee smoking a cigar in his own office, knowing that a co-worker present in the room found the smoke obnoxious (an actual case from North Carolina that was dismissed in 1979), “would very likely result in liability today.”

Consider an instance in which an employee finds a co-worker’s body odor or perfume to be similarly obnoxious. The employee reports the offense to human resources, which then addresses the concern with the co-worker. But the employer and the co-worker are now on notice of the employee’s particu-
lar sensitivity. Under the restatement, they could face liability if the co-worker reports to work again sporting the offensive aroma.

And what about that annoying co-worker who uses the microwave to heat up her fish sandwich for lunch every Friday?

The new restatement will place employers in a particularly difficult position when managing employees. Will employers be called on to ask certain employees whether they have sensitivities that are peculiar to them? How will the employer know when to ask? And does the employer risk invading that employee’s privacy by asking for such information?

Unfortunately, the new standard likely will have the perverse effect of discouraging employer efforts to promote courteous and respectful behavior in the workplace.

Consider a situation in which a female employee informs her employer that due to her religion, she finds any physical contact with men outside of her family to be highly offensive. Normally, we would applaud the efforts of an employer to provide sensitivity training to make its employees aware of this cultural belief. Under the restatement, however, such training puts all employees on notice of the particular sensitivity and exposes them to a lawsuit based on an otherwise innocuous back-pat or handshake.

Is this really what the ALI had in mind, or is it simply an unintended consequence of an ill-conceived amendment?

Anti-bullying legislation

With respect to proposed “anti-bullying” legislation, the waters are even murkier.

Since 2003, 29 states have introduced some version of workplace anti-bullying legislation. No state has yet adopted such a law, although the organization behind the effort, the so-called Workplace Bullying Institute, has been persistent in keeping the bills alive on the floors of state legislatures, introducing 11 bills in 10 states in 2015 alone.

The proposed legislation would create a new private cause of action for subjecting an employee to an “abusive work environment” that causes physical or psychological harm. Under the current bill proposed in Massachusetts, for example, the “abusive” employee can be held personally liable and the employer can be held vicariously liable for compensatory damages, punitive damages and attorneys’ fees.

The ambiguity inherent in the legislation’s language will open the door to a flood of frivolous claims. While current employment discrimination laws are intended to protect classes of people recognized as historically disadvantaged in the workplace, under the pending legislation anyone — regardless of race, nationality, sex, disability or age — is both a potential beneficiary and target of the legislation.

The proposed laws require no proof of discriminatory animus: legal redress would be available for “abusive conduct” motivated by something as simple as a personality clash or overzealous management.

It is that last situation in which the unintended consequences of the law are most apparent. Of course, from an employee’s perspective it can feel uncomfortable — perhaps even abusive — to receive pressure or criticism from a supervisor. But nobody would seriously challenge the employer’s right to convey the message.

Supervisors need to know that they can communicate openly and candidly without fear of legal reprisal. By potentially labeling such conduct as “abusive,” there exists a profound risk that high expectations go by the boards and employees are denied real opportunities for advancement.

Again, the law of unintended consequences rears its ugly head.

Leave it to HR

It is unreasonable to suggest that courts are the appropriate forum for handling what are, in essence, civility disputes. It should come as no surprise that courts have repeatedly cautioned that they are not, nor should they be considered, “super-personnel departments.”

With new laws for battery and bullying in the workplace, the courts will be required to play the role of psychoanalyst, spending time and resources determining plaintiffs’ particular subjective hyper-sensitivities and perceptions of offense and abuse by co-workers.

The appropriate forum for handling complaints of workplace behavior is at ground level: through HR and internal dialogue, not through the court system.

The Supreme Court has warned that the employment laws are not to be used as a general civility code. But under these proposed laws to outlaw behavior that some might find discourteous or impolite, we move dangerously close to that paradigm.

The United States has always prided itself on its rugged, even idiosyncratic, individualism. And, at a time when corporate America at least purports to celebrate diversity in the workplace, it is ironic that laws are being considered that would serve to clone workplace behavior.