

DATE: **2009 January**
PODCAST: **The Undercover Lawyer**
TITLE: **Episode 8: The Bullying Boss Gets Found Guilty In Court**

Welcome to the "Hostile Work Place" podcast number eight. I am your host, the Undercover Lawyer. So welcome again to podcast number eight already. This is the legal podcast with practical tips in easy to understand terms that can help you deal with a bully boss or a hostile work environment.

Today's main segment will be exciting to many people, The Bullying Boss Gets Found Guilty In Court. This is a recent case from the Indiana Supreme Court that featured testimony by Dr. Gary Namie of the Bullying Institute. Dr. Namie has been at the forefront of lobbying State legislatures for changes in the law to outlaw bullying in the workplace. So far, his efforts haven't been realized in state legislatures but in this instance in a court, his testimony seemed to carry the day.

For our Weekly Quick Tip, it's all about the ADA. The ADA was amended by Congress as of January 1, 2009 and now, we're all disabled. I'll explain what I mean by that when we get to the Quick Tip segment.

Our Employment Law Academy is being built. In fact, there is now a copy of our new logo on the website that you can take a look at if you look at the show notes for this podcast at UndercoverLawyer.com. We're going to have a lot of exciting content including many things that people have specifically asked for. So if there is something that you would like to see that you would like to learn about your legal rights in the workplace or question that you have, feel free to submit it either directly to me via e-mail or leave a comment in the Undercover Lawyer forum.

Finally, the promised Spanish version of Undercover Lawyer's Work Laws Exposed is going to be available before this podcast reaches the air. So if you know of someone whom speaks Spanish and would have an easier time understanding their rights if they were reading it in Spanish, feel free to tell them to look at UndercoverLawyer.com.

Now, for our feature segment, The Bully Boss Gets Found Guilty In Court. The case is Raess v. Doescher from the Indiana Supreme Court. A little background on the case, when it went to trial the plaintiff employee won. Then the losing defendant who was actually a surgeon, and the surgeon is the bully boss in this case, I guess a real

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arrogant, loud mouth, cussing and swearing at everyone, no one's is good enough for him type person. So he appealed and the Court of Appeals reversed the trial court decision that had been in favor of the employee. The reason that the Court of Appeals reversed was due to what they call the "prejudicial" testimony of Dr. Gary Namie whom is the head of the Bully Buster Institute and is the leading proponent in the US of anti-bullying legislation.

So the Court of Appeals said that the trial judge made a mistake in allowing Dr. Namie to testify. That his testimony should have been excluded and it was so prejudicial that the defendant/surgeon/bully boss could not possibly have had a fair trial because Namie was able to testify. Well the employee appealed that decision by the Indiana Court of Appeals and that went to the Indiana Supreme Court. That's what we're going to talk about here today.

So the employee is Joseph Doescher and he is an operating room perfusionist. What a perfusionist is, is the person who operates the heart/lung machine during open-heart surgeries. Now at the time of this whole incident, he was the hospital's head perfusionist. So he supervised and scheduled the other two or three perfusionists that worked there. The defendant in the case, the bad bully boss, is Daniel Raess, who is an MD and a cardiovascular surgeon.

The first incident between the perfusionists and Dr. Raess didn't involve Doescher. In fact, it was two of the perfusionist that he supervised. No one was available to run the perfusion machine when Raess needed to perform an emergency open-heart surgery. He became irate and yelled at the two perfusionists that Doescher supervises. The next day, those two told Doescher about being yelled at by Dr. Raess and Doescher decides that he's going to protest by resigning his position as the chief perfusionist at the hospital.

Now although he resigned his position as the chief perfusionist, he stayed on as a regular staff perfusionist. This was all on November 1, 2001. Then the next day, November 2, 2001, Doescher has to be the perfusionist for a surgery performed by Dr. Raess. So afterwards, after the surgery, Raess approaches Doescher to talk about

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coverage issues like the one the day before when there were not enough perfusionists. Doescher says to Raess, "Hey, I'm no longer the chief perfusionist, coverage issues are not my concern. Take it to the hospital administration."

So at that point, the two men separate and there is no yelling or screaming or fighting or anything. But later in the day, Doescher and Raess were together in the pump room, a room that's between operating rooms and the hospital's open-heart surgery area. So they're in the pump room and an argument ensues between Raess and Doescher. Dr. Raess becomes so angry that his body stiffens up, his face turns red, his jugular veins start to extend. Then he walks toward Doescher and exits out the door real close to him.

During the trial, Doescher testified that Raess walked toward him in a manner that caused Doescher to think that Raess was going to "smack the shit out of me." Doescher also testified that Dr. Raess had balled up his fists. Although his fists were at his sides, the way Raess was walking purposefully straight at Doescher made Doescher back up against the wall and raise up his hands in front of his face in defense. He was that sure that Raess was going to hit him. But instead of hitting him, just as Dr. Raess went out the door, he yelled at Doescher, "You're over! You're history! You're finished!"

So after this incident on November 2, the perfusionist Doescher says he became depressed. He was agitated, felt highly anxious. He developed sleep problems and a loss of appetite. Doescher testified that he so lost his confidence that he was unable to return to work as a staff perfusionist at the hospital. He also had medical physicians of his own come in and testify about the effects of this incident on his mental health and his physical health.

Doescher further testified during the trial that this incident, which he termed "assault," detrimentally affected his ability to earn money, his career, his ability to interact with his wife, his ability to interact with his other family members and just people in general. He wasn't able to work. He lost his ability to feel normal emotions. He lost his ability to focus and became unable to make split-second

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decisions. All these things folded into him no longer being able to work and earn a living. Doescher's own doctor testified that all of this led to Doescher contracting "major depressive disorder with anxiety and panic disorder."

Now a quick aside here, if any of you have been the victim of a workplace bully whom has singled you out, yelled at you, screamed at you. You thought they maybe were going to hit you or mock you in front of a bunch of other people. You know, as do I, that what Doescher felt here is not unique at all. That this is often how people feel. That they go home, they feel like they can't go back to work. They're afraid of the person who is yelling at them, mocking, screaming and swearing at them. They lose their ability to function in the workplace. There's often feelings of panic and anxiety and depression as well.

I know a lot of people are going to listen to this and they're going to be nodding their heads and they're going to think, "That was me. It was just like that when it happened to me." In fact, there's already lots of posts at UndercoverLawyer.com/forum/ about the same kind of feelings in response to being bullied by a supervisor.

Just in case you happen to be listening from the State of Indiana, I should let you know that the hospital in question was in Beech Grove and it's St. Francis Hospital. Also, when the case actually went to trial, the jury came back and found for the plaintiff on the assault claim. Saying that the doctor inflicted the apprehension of imminent bodily harm without actually touching the plaintiff and that qualifies as assault. You don't actually have to touch someone to commit assault. If you do touch them, that's battery.

So the jury found for the plaintiff on assault but found for the plaintiff on assault but found for the doctor, Raess, on the issue of intentional infliction of emotional distress. Actually, I think that intentional infliction of emotional distress is the claim that comes the closest to reflecting bullying behavior and I wish they had found him guilty on that one. Assault doesn't seem as directly related to the testimony about bullying that Dr. Namie gave.

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So how much money were they fighting over on appeal? Well when the jury came back with a verdict in favor of the perfusionist, Doescher, they returned a verdict for monetary damages in the amount of \$325,000 as compensatory damages. They didn't give Doescher any money for punitive damages.

Now how afraid were they of Dr. Namie, they being Dr. Raess and his attorneys? Well they filed motions before the trial started which is called a motion in limine to exclude the testimony of Dr. Namie. Other words they say, "Judge, the plaintiff Doescher has this witness on his witness list and you can't let him testify because he's not qualified. It will be prejudicial. There won't be a fair trial if you let him testify, so exclude him from the start."

What the judge found was that Dr. Namie could say that the plaintiff was a workplace bully toward the plaintiff but that Dr. Namie could not paint Dr. Raess as a workplace bully against the whole world. Like he was just a bully to everyone, everywhere. Dr. Namie's testimony, according to the trial judge, had to be limited to the relationship between Doescher and Dr. Raess.

Dr. Namie was introduced to the jury as someone who was an organizational psychologist, who was going to give their opinion about what the people in the trial did. The trial judge said to the jury that it was up to the jury to decide what weight, if any, to give Dr. Namie's testimony. Only after all of that did Dr. Namie get to testify and he said, "In my opinion, it's an episode of workplace bullying." Dr. Namie went on to say that, "I concluded based on what I heard and what I read that Raess is a workplace abuser. A person who subjected Doescher to an abusive work environment. It was a horrific day. It was a particularly egregious, outrageous episode."

So you can see that by what Dr. Namie said it seemed to support the idea of punitive damages. It very much went to the idea that Dr. Raess was intentionally inflicting emotional distress on Doescher and because of that, I think there's kind of a disconnect here in this case between Namie's testimony and the jury's verdict, which

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was for assault and no punitive damages instead of bringing back a verdict that was also in favor of intentional infliction of emotional distress and favoring punitive damages or awarding them to Doescher.

Despite all that however, Dr. Raess decided that he would go ahead and appeal and said that Dr. Namie's testimony that he was a workplace bully was inherently prejudicial and it impermissibly suggested to the jury that he acted with an intent to bully. Well, he did.

Now here's where the case gets interesting and will be cited over and over and over by people who feel that they have been bullied by their bosses. The Indiana Supreme Court was reviewing an objection by the doctor about the jury instructions that were given to the jury at trial and one of the doctors suggested jury instructions. Was that the jury did not have to decide whether workplace bullying was an issue in the case. That it was not an issue in the case and that they didn't need to decide whether the defendant doctor was in fact a workplace bully. They just had to decide the issues of assault and intentional infliction of emotional distress and therefore the doctor should get a new trial.

However, this is the magic language; the Indiana Supreme Court came back and said they disagreed about whether or not workplace bullying was an issue in the case. They said, and I'm going to quote it, "In determining whether the defendant assaulted the plaintiff or committed intentional infliction of emotional distress, the behavior of the defendant was very much an issue. The phrase 'workplace bullying' like other general terms used to characterize a person's behavior is an entirely appropriate consideration in determining the issues before the jury."

The Indiana Supreme Court then even went so far as to say, "Workplace bullying could be considered a form of an intentional infliction of emotional distress." Then even said when the doctor tried to have the judge tell the jury that workplace bullying was not an issue in the case that that request by the doctor was incorrect. The Indiana Supreme Court then reversed the Court of Appeals and reinstated the jury verdict that

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came back in favor of Doescher and against Dr. Raess at the trial court level and awarded Doescher the \$325,000 that the jury gave him from Dr. Raess.

So you can see how the outcome was very good for Doescher and people who maybe in situations like him. The language that the Indiana Supreme Court used to reinforce the idea that workplace bullying is an acceptable topic for plaintiffs to bring up during a court trial against their boss, that is groundbreaking. That is the part that is really good for everyone out there who feels like they're a victim of a hostile work environment caused by their boss.

However, it would have been even better if the jury had come back with a verdict on the intentional infliction of emotional distress claim because that is the thing that Namie testified about most directly. It would have been even better still if they had brought back that emotional distress verdict and awarded punitive damages. Then it would have been a homerun. But as it was, it was a good double and a very good case for breaking the ice on this issue and getting things moving. Hopefully there will be other courts that follow suit in the future.

Well and now for the final segment, the Quick Tip in the podcast today. The US Congress passed the ADA Amendments Act of 2008, which is now the ADAAA, which was signed into law in September 25th. What it does is it redefines key terms of the ADA. When it was first passed, many of the terms were not defined and those were left to the courts to define.

So what is a disability was defined by the courts, went up to the Supreme Court a couple of times, specifically in a case called Toyota Manufacturing versus Williams. The Supreme Court in essence held that if you have a physical problem that can be corrected with treatment or with medicine, then you're not disabled. For instance, if you have sleep apnea but it can be controlled with medication, then you're not disabled. If you have narcolepsy that can be controlled with medication, you're not disabled. If you have cancer that can be cured with radiation or chemotherapy, then you're not disabled.

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Well, Congress didn't like those definitions of what was disabled and they meant for the ADA to be more broadly defined and cover more people. So they passed the ADAAA and basically overturned the Supreme Court on the issue of defining what means disability and significantly expanded the definition.

So now, courts should not take into account any sort of corrective treatments or medicines that a person has available to them except for, and there's the one exception, eyeglasses or contacts. In other words, if you have bad vision like me and it's correctable with contacts like with me, then you are not disabled like me, at least on that issue.

Now, I've said on the forums and in some e-mails to people, nowadays everyone is disabled. We're all disabled once the ADAAA passed. This is because Congress really doesn't want employers arguing with employees about whether or not they are disabled. Congress wants employers to instead say, "Okay, I understand that you feel you're disabled. Let's start talking about what accommodations would be appropriate for you."

That's required now. The employer should engage you in the interactive process which basically means you say you're disabled and you need a little extra help in order to do the core functions of your job. Your employer should immediately say, "Okay, let's talk about what accommodations you need to be able to do your job and whether or not those accommodations would be an undue burden on the company." The bigger the company with the more people and more money then the greater lengths that company has to go to in order to accommodate you.

In other words, an expensive accommodation may not be an undue burden to Microsoft or to Intel but that may be a very undue burden to a mom and pop corner grocery or to a gas station that is owned by one person and only has one location. So you see how the size of the company can still affect whether or not something is an undue burden but whether or not the person is disabled should no longer be an issue except in the most obvious of cases.

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So if you have really any medical condition that interferes with your ability to do your job, you qualify for protection under the ADA. It is that broad and that's great news if you are dealing with a horrible boss and that has caused you some of the things that we'd talked about Doescher experiencing after he had been assaulted by Dr. Raess. He felt like he couldn't go to work anymore, he couldn't sleep. He was having anxiety attacks. All of those things would show your doctor that you are suffering or you're impaired in the major life activity of being able to work, being able to sleep, being able to converse with other humans. On that ground alone, you could be considered disabled and you could go to your employer and ask for an accommodation.

Now I hope the day will come when a legitimate accommodation is asking for a different supervisor but so far, courts have said that is not the case. We'll continue knocking on that door but we're not there yet. However, you could request a different type of supervision. Your supervisor not yell or scream. Basically not act like a jerk and how would your company look if they refused that kind of accommodation or said it was unduly burdensome to not give you that. They'd look very bad and if they did that, they would be setting you up for a win later down the road.

Well, that is all for this episode. I hope that you've found it helpful and if you have, please consider going to iTunes, finding the "Hostile Work Place" podcast and leaving a positive comment under the comments button, which is on the right hand side about halfway down the page. There will be link to that on the Undercover Lawyer website and there'll also be show notes with a link to the case, Doescher versus Raess. So you can print it out and even highlight the text that I talked about and read it for yourself or show it to your boss or just other people you know of that are going through these same trials.

Stay tuned for our next episode and check the website for additional resources and don't be hesitant to use our comment line. If you have a comment about this episode or any other issue of dealing with a hostile workplace or you would like to tell your own story and you don't mind me using portions of it on the air, please call. It's (360)

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450-5750. I hope to hear from you soon and remember that legal knowledge truly is power.

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