

**STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL**

April 3, 2019

Opinion No. 19-04

Healthy Workplace Act

Question 1

Proposed legislation, HB 856/SB 815, 111th Tenn. Gen. Assem. (2019), would add private employers to the entities covered by the Healthy Workplace Act, Tenn. Code Ann. § 50-1-501 et seq. If the legislation becomes law, would private employers who adopted the statutorily required anti-bullying policies receive the same immunity under the Healthy Workplace Act as do public employers who adopt such policies?

Opinion 1

Yes.

Question 2

Would a private employer be immune from suit if it had not adopted the model anti-bullying policy established by the Healthy Workplace Act?

Opinion 2

A private employer who had not adopted the model anti-bullying policy would not be immune from suit unless the employer had adopted an anti-bullying policy that satisfied the requirements of Tenn. Code Ann. § 50-1-503(b).

Question 3

Would a court put the burden of proof on a private employer who does not qualify for immunity and who is sued by an employee for infliction of mental anguish by the abusive conduct of another employee?

Opinion 3

As a general matter, a plaintiff who sues a private employer for infliction of mental anguish based on the abusive conduct of one of its employees bears the burden of proof. Neither the Healthy Workplace Act nor the proposed legislation should be a basis for shifting that burden of proof in a civil lawsuit against a private employer.

Question 4

What constitutes “mental anguish” within the meaning of the Healthy Workplace Act?

Opinion 4

“Mental anguish” means a “serious or severe mental injury,” as described in *Rogers v. Louisville Land Co.*, 367 S.W.3d 196 (Tenn. 2012).

Question 5

Would proposed Amendment No. 1 provide additional immunity to private employers?

Opinion 5

No.

ANALYSIS

The Healthy Workplace Act, 2014 Tenn. Pub. Acts, ch. 997, codified at Tenn. Code Ann. §§ 50-1-501 through 50-1-504 (“the Act”), was enacted to help prevent “abusive conduct” in the workplace in state and local government in Tennessee. *See* Tenn. Att’y Gen. Op. 15-01 (Jan. 6, 2015). If a state or local public employer adopts either the model anti-bullying policy created by the Tennessee Advisory Commission on Intergovernmental Relations (TACIR) pursuant to Tenn. Code Ann. § 50-1-503(a), or adopts an anti-bullying policy that satisfies the requirements of Tenn. Code Ann. § 50-1-503(b), the Act immunizes that employer from liability for any negligent or intentional infliction of mental anguish caused by the abusive conduct of its employees. *Id.*; *see* Tenn. Code Ann. § 50-1-504; *see also* Tenn. Att’y Gen. Op. 15-39 (Apr. 22, 2015) (concluding that the Act’s direction that TACIR create a model anti-bullying policy did not constitute an unconstitutional delegation of legislative authority).

Proposed legislation, HB 856/SB 815, 111th Tenn. Gen. Assem. (2019),¹ would extend the Act to include private employers. Currently, the Act defines “employer” to include only “any agency, county, metropolitan government, municipality, or other political subdivision of th[e] state.” Tenn. Code Ann. § 50-1-502(3). The proposed legislation would change the definition of “employer” in the Act to mean both “a private employer and a state or local governmental entity.”

1. Under the proposed legislation, private employers would receive the same immunity that public employers currently enjoy under the Act. Currently, the Act immunizes a public employer from suit for negligent or intentional infliction of mental anguish based on its employees’ abusive conduct “if an employer adopts the model policy created by TACIR pursuant to § 50-1-503(a) or adopts a policy that conforms to the requirements set out in § 50-1-503(b).” Tenn. Code Ann. § 50-1-504.

¹ This opinion is based on the version of the proposed legislation that was pending before the General Assembly as of the date of this opinion. A copy of that version is attached, and references to the “proposed legislation” in this opinion are to the attached version, including Amendment No. 1.

By including private employers within the statutory definition of “employers,” the proposed legislation would extend that immunity to private employers. The proposed legislation would not otherwise alter § 50-1-504 or the Act. Accordingly, private employers who had adopted the model policy or a policy meeting the requirements of § 50-1-503(b) would be immune from suit alleging the negligent or intentional infliction of mental anguish based on employees’ abusive conduct to the same extent public employers are immune under the Act.

2. Under the proposed legislation, a private employer will be immune from suit under the Act only if it complies with § 50-1-504, by adopting either (1) the model anti-bullying policy promulgated by TACIR pursuant to the requirement of Tenn. Code Ann. § 50-1-503(a),² or (2) a policy that “conforms to the requirements set out in § 50-1-503(b).”³ Thus, a private employer that had not adopted the model policy would not be immune from suit under the Act unless the employer had adopted a policy that conformed to the requirements of § 50-1-503(b).

3. As a general matter, a plaintiff suing a private employer for negligent or intentional infliction of mental anguish based on the abusive conduct of an employee bears the burden of proof. *See, e.g., Camper v. Minor*, 915 S.W.2d 437, 446 (Tenn. 1996) (noting a “plaintiff must present material evidence as to each of the five elements” required for a negligent infliction of emotional distress claim). Neither the Act nor the proposed legislation affect such actions in any way except to provide immunity for employers that have satisfied the requirements of § 50-1-504. Thus, the proposed legislation itself does not alter the burden of proof in a civil lawsuit against a private employer.

4. The Act immunizes public employers from liability for the “negligent or intentional infliction of mental anguish.” Tenn. Code Ann. § 50-1-504. The Tennessee Supreme Court has construed “mental anguish” to be synonymous with “emotional distress,” *see Sallee v. Barrett*, 171 S.W.3d 822, 824 n.1 (Tenn. 2005), and concluded that proof of “emotional distress” requires a showing of “serious or severe mental injury,” *Rogers v. Louisville Land Co.*, 367 S.W.3d 196 (Tenn. 2012). “Mental anguish” thus does not include “every minor disturbance to a person’s mental tranquility,” but only “serious or severe emotional injuries.” *Rogers*, 367 S.W.3d at 208 (quoting *Ramsey v. Beavers*, 931 S.W.2d 527, 532 (Tenn. 1996)).

Rogers provides six “nonexclusive factors” to “inform the analysis” of whether a plaintiff has “suffered a serious mental injury”:

- (1) Evidence of physiological manifestations of emotional distress, including but not limited to nausea, vomiting, headaches, severe weight loss or gain, and the like;
- (2) Evidence of psychological manifestations of emotional distress, including but not limited to sleeplessness, depression, anxiety, crying spells or emotional

² See Report of the Tennessee Advisory Commission on Intergovernmental Relations, *Model Abusive Conduct Prevention Policy* (Jan. 2015), available at <https://www.tn.gov/content/dam/tn/tacir/commission-meetings/2015-january/2015Tab%204HealthyWorkplace.pdf>.

³ Section 50-1-503(b) requires an anti-bullying policy to: (1) “Assist employers in recognizing and responding to abusive conduct in the workplace” and (2) “Prevent retaliation against any employee who has reported abusive conduct in the workplace.” Tenn. Code Ann. § 50-1-503(b).

outbursts, nightmares, drug and/or alcohol abuse, and unpleasant mental reactions such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, and worry;

(3) Evidence that the plaintiff sought medical treatment, was diagnosed with a medical or psychiatric disorder such as post-traumatic stress disorder, clinical depression, traumatically induced neurosis or psychosis, or phobia, and/or was prescribed medication;

(4) Evidence regarding the duration and intensity of the claimant's physiological symptoms, psychological symptoms, and medical treatment;

(5) Other evidence that the defendant's conduct caused the plaintiff to suffer significant impairment in his or her daily functioning; and

(6) In certain instances, the extreme and outrageous character of the defendant's conduct is itself important evidence of serious mental injury.

Id. at 209-10.

In short, whether alleged injuries constitute “mental anguish” within the scope of the Act would depend on the particular facts and circumstances involved as analyzed according to the six *Rogers* factors, among any other factors that may be relevant in any given case.

5. Proposed Amendment No. 1 to the proposed legislation would keep the existing immunity language of Tenn. Code Ann. § 50-1-504 as subsection (a) and would add, as a new subsection (b), the following:

Nothing in this section creates a cause of action against an employer who does not adopt the model policy created by TACIR pursuant to § 50-1-503(a) or adopt a policy conforming to the requirements set out in § 50-1-503(b).

This new language confirms that neither the Act nor the proposed legislation creates or confers a private right of action. But the new language would not provide any additional immunity for private or public employers; it would not alter the immunity of public or private employers under the Act.

“[F]or legislation enacted by the general assembly to create or confer a private right of action, the legislation must contain express language creating or conferring the right,” and, absent such language, “no court . . . shall construe or interpret a statute to impliedly create or confer a private right of action.” Tenn. Att’y Gen. Op. 15-01(quoted Tenn. Code Ann. § 1-3-119). As our previous opinion concluded, because no provision of the Act expressly creates a new private cause of action for abusive conduct, the Act does not create a private right of action against either employers or employees. *Id.* The new language in Amendment No. 1 would affirmatively reinforce that conclusion with regard to private causes of action against both public and private employers.

In sum, Amendment No. 1 makes clear that neither the Act nor the proposed legislation creates a cause of action against employers—public or private—who fail to adopt the model policy or a policy that satisfies the requirements of § 50-1-503(b).

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Requested by:

The Honorable Clark Boyd
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HOUSE BILL 856

By Parkinson

AN ACT to amend Tennessee Code Annotated, Title 50,
Chapter 1, relative to employment.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 50-1-502, is amended by deleting subdivision (3) and substituting instead the following:

(3) "Employer" means a private employer and a state or local governmental entity.

SECTION 2. This act shall take effect upon becoming a law, the public welfare requiring it.

Amendment No. _____

[Handwritten Signature]

Signature of Sponsor

FILED
Date _____
Time _____
Clerk _____
Comm. Amdt. _____

AMEND Senate Bill No. 815

House Bill No. 856*

by deleting all language after the enacting clause and substituting instead the following:

SECTION 1. Tennessee Code Annotated, Section 50-1-502, is amended by deleting subdivision (3) and substituting instead the following:

(3) "Employer" means a private employer and a state or local governmental entity.

SECTION 2. Tennessee Code Annotated, Section 50-1-504, is amended by deleting the section and substituting instead the following:

(a) Notwithstanding § 29-20-205, if an employer adopts the model policy created by TACIR pursuant to § 50-1-503(a) or adopts a policy that conforms to the requirements set out in § 50-1-503(b), then the employer is immune from suit for any employee's abusive conduct that results in negligent or intentional infliction of mental anguish. Nothing in this section limits the personal liability of an employee for any abusive conduct in the workplace.

(b) Nothing in this section creates a cause of action against an employer who does not adopt the model policy created by TACIR pursuant to § 50-1-503(a) or adopt a policy conforming to the requirements set out in § 50-1-503(b).

SECTION 3. This act shall take effect upon becoming a law, the public welfare requiring it.



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