SENATE DOCKET, NO. 1741 FILED ON: 2/18/2021

SENATE . . . . . No. 1185

The Commonwealth of Massachusetts

PRESENTED BY:

***Diana DiZoglio*, (BY REQUEST)**

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act to establish the Dignity At Work Act (DAWA).

PETITION OF:

NAME:	DISTRICT/ADDRESS:	
Debra Falzoi		
Michael O. Moore	*Second Worcester*	*3/2/2021*
Anne M. Gobi	*Worcester, Hampden, Hampshire and Middlesex*	*3/2/2021*
Joanne M. Comerford	*Hampshire, Franklin and Worcester*	*3/3/2021*
Christopher Hendricks	*11th Bristol*	*3/29/2021*
James B. Eldridge	*Middlesex and Worcester*	*7/12/2021*

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SENATE . . . . . No. 1185

By Ms. DiZoglio (by request), a petition (accompanied by bill, Senate, No. 1185) of Debra Falzoi, Michael O. Moore, Anne M. Gobi, Joanne M. Comerford and others for legislation to establish the Dignity At Work Act (DAWA). Labor and Workforce Development.

The Commonwealth of Massachusetts

In the One Hundred and Ninety-Second General Court
(2021-2022)

An Act to establish the Dignity At Work Act (DAWA).

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Section 1. Findings

1. Generalized workplace harassment and bullying is a severe and pervasive problem. At least one third of workers in the United States will face workplace bullying during their careers. Workplace bullying leads to a loss of esteem, dignity, and self-worth for targets and witnesses. Workplace bullying also leads to severe emotional, psychological, economic, and physical harm to targets. Such harms include feelings of shame and humiliation, anxiety, depression, insomnia, hypertension, substance abuse, post-traumatic stress disorder, suicidal ideation, heart disease, stress-induced illnesses, suicide, workplace violence, and job loss.

2. Generalized workplace harassment and bullying costs American employers billions of dollars in lost productivity, turnover, absenteeism, presenteeism, decreased morale, increased insurance premiums, workers' compensation, and medical and legal costs.

3. Workplace bullying and general harassment has been studied in the United States since at least 1976, when psychiatrist Carroll Brodsky published the earliest examination of workplace bullying in America. Since then, a multitude of employer systems have been made available to address the problem. Despite these decades of work and awareness, employer policies alone have been ineffective in preventing, remedying, and eliminating workplace bullying.

4. In 1986, the United States Supreme Court first determined that discriminatory harassment in the workplace that creates a hostile work environment is prohibited under federal law. Hostile work environments are prohibited under various federal anti-discrimination statutes, such as Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990 (ADA), and the Age Discrimination in Employment Act of 1967 (ADEA). However, a hostile work environment unconnected to an employee's membership in a protected group is not actionable under these laws. If mistreated employees who have been subjected to harassment cannot establish that the behavior was motivated by discrimination, such employees are unlikely to be protected by the law against such mistreatment.

5. Existing workers' compensation provisions and common law tort law are inadequate to discourage workplace bullying or to provide adequate redress to employees who have been harmed by workplace bullying.

6. Since the 1940s, the right to dignity has been recognized as an inalienable human right and the foundation of freedom, justice, and peace in the world. A typical adult will spend at least a third of their waking hours at work. Therefore, the right to dignity must be assured in the workplace. To protect workers' right to dignity, legislation must be passed protecting this right

and providing legal recourse for targets of workplace bullying and/or general harassment and other abusive behaviors.

Section 2. Purpose

It is the purpose of this Act to:

1. Recognize and protect the right to dignity and other human rights in the workplace and to prevent any abusive or negative behaviors that infringe upon these rights in the workplace.

2. Prevent, detect, remedy, and eliminate workplace bullying, moral, psychological, and general harassment, and other abusive behavior from the American workplace.

3. Provide a remedy for workers who are targets of workplace bullying, moral, psychological, or general harassment, and/or other forms of workplace abuse to make whole such targets of workplace abuse.

4. Provide an incentive for employers to prevent, detect, remedy, and eliminate workplace bullying, moral, psychological, and general harassment, and other forms of abuse in the workplace so that such behaviors shall be addressed and eliminated before they cause harm to the targets of such behaviors.

Section 3. Definitions

For the purposes of this Act, the following words and phrases shall have the following meanings:

1. “Employer” – Employers shall be defined as any organization or individual employing an individual to engage in any work on their behalf or on behalf of their subsidiaries, customers,

or clients, whether such work is paid or unpaid. Employers shall include non-profit agencies employing volunteers and organizations hiring workers through a temporary agency or other such organization to perform work on their behalf. Employers who exert control over the means, methods, payroll, or personnel practices of their suppliers shall be considered joint employers with said supplier for the purpose of this Act. Where more than one organization or individual meets the definition of employer under this Act, for the purpose of a claim by a targeted employee, such organizations shall have joint and several liability as co-employers.

2. "Employee" – One who engages in work for another, whether such work is paid or unpaid or whether such other directly employs said employee. Employees includes individuals who perform work in any capacity, including apprentices, trainees, unpaid interns, volunteers, farm workers, union stewards, and other representatives or independent contractors.

3. "Supervisor" – One who has control over any of the means, methods, wages, benefits, terms, or conditions of another either through formal or implied authority. The term "supervisor" shall not be limited to only those with the power to hire, fire, demote, promote, transfer, or discipline. It includes those with the power to set schedules, make task assignments, mediate complaints, distribute rewards and punishments, or assert other intangible forms of authority.

4. "Right to Dignity" – The fundamental right to receive respect for one's dignity as a human being and the right to enjoy the conditions necessary for human dignity to flourish. Respect for dignity implies the right not to be treated in a degrading or humiliating manner.

5. "Workplace Bullying" – Workplace bullying shall be defined as the unwanted abuse of any source of power that has the effect of or intent to intimidate, control, or otherwise strip a target of his or her right to esteem, growth, dignity, voice, or other human right in the workplace.

Workplace bullying may take the form of moral, psychological, or general harassment, incivility, abusive supervision, violence, mobbing, aggressions, and other types of objectionable behaviors. Further, these behaviors may take the form of interpersonal interactions or organizational practices or management actions. These behaviors may occur face-to-face or via cyberbullying. The behaviors may come from any level of the

organization – supervision, co-workers, customers, and other third parties. The source of power shall not be considered as limited to formal organizational power or authority.

6. "Moral, Psychological, or General Harassment" – Unwelcome, objectionable conduct that is severe or pervasive enough to create an intimidating, hostile, or abusive environment.

7. "Management Action" – A course of action that is taken by an employer or its supervisors or its agents to direct and control the way work is done.

8. "Organizational Practices" – Actions taken and policies and practices implemented in the workplace to direct the work and production of an organization.

9. "Just Cause" – Standard of reasonableness used to evaluate a person's actions in a given set of circumstances. If a person acts with just cause, their actions are based on reasonable grounds and committed in good faith.

10. "Retaliation" – Retaliation is a materially adverse action that might deter a reasonable person from engaging in protected activity such as submitting a complaint or reporting abuse. "Materially adverse" includes any form of unfavorable treatment that rises above trivial harms, petty slights, or minor annoyances. Materially adverse action need not be job-related or occur in the workplace to constitute unlawful retaliation.

11. “Constructive discharge” – an adverse employment action where:

a. The employee reasonably believed he or she was subjected to an abusive work environment;

b. The employee resigned because of that conduct; and,

c. The employer knew or should have known of the abusive conduct prior to the resignation and failed to stop it.

Section 4. Worker Right to Dignity in the Workplace

Every worker shall have the right to a work environment that affords them the dignity to which all human beings are entitled — free from all forms of bullying, mobbing, and harassment.

Section 5. Prohibited Activities under this Act

1. It shall be unlawful for any person to engage in workplace bullying or moral, psychological, or general harassment of a co-worker or other employee in the work environment. Bullying and moral, psychological, or general harassment shall be prohibited without regard to its subject matter or motivating animus.

There is no requirement that the bullying behavior be extreme, outrageous, or repetitive to be unlawful under this Act.

a. Workplace bullying and general, psychological, and moral harassment can encompass a broad spectrum of conduct. Examples of workplace bullying include but are not limited to:

i. Persistent or egregious use of abusive, insulting, or offensive language;

ii. Unwarranted physical contact or threatening gestures;

iii. Interfering with a person’s personal property or work equipment;

iv. The use of humiliation, personal criticism, ridicule, and demeaning comments;

v. Overbearing or intimidating levels of supervision;

vi. Withholding information, supervision, training, or resources to prevent someone from doing their job;

vii. Changing work arrangements, such as rosters, offices, assignments, leave, and schedules to deliberately inconvenience someone;

viii. Isolating or marginalizing a person from normal work activities;

ix. Inconsistently following or enforcing rules to the detriment of an employee;

x. Unjustifiably excluding colleagues from meetings or communications;

xi. Intruding on a person's privacy by pestering, spying, or stalking;

xii. Any abusive or unjust use of employment or workplace policies including performance reviews, assignments of work, excessive monitoring of work, or unreasonable assignment of or removal of work tasks;

xiii. Spreading misinformation or malicious rumors;

xiv. Subjecting individuals to excessive supervision and unwarranted monitoring;

xv. Inappropriate use of disciplinary procedures, including using performance reviews to misrepresent an employee’s work history;

xvi. Arbitrarily withholding information that is vital for effective work performance;

xvii. Unjustifiably removing whole areas of work responsibility from a person;

xviii. Setting impossible targets and objectives or changing targets without telling the person;

xix. Deliberate isolation by ignoring or excluding a person;

xx. Setting tasks that are unreasonably below or beyond a person's skill level;

xxi. Denying access to information, supervision, consultation, or resources to the detriment of the worker;

xxii. Conducting an unfair workplace investigation;

xxiii. Any disciplinary action taken not based on just cause.

b. A single incident of bullying or harassment is sufficient to create a triable issue regarding the existence of a hostile work environment if the bullying or harassing conduct creates an intimidating, hostile, or offensive working environment. The question of whether an environment is objectively hostile or abusive is a question of fact that must be answered by reference to all circumstances.

c. The offender’s intent shall not be a required element to support a claim of workplace bullying or moral, general or psychological harassment. The

decision on whether bullying or any form of harassment has occurred is not to be determined by the intent of the offender but rather by the nature of the behavior itself.

d. The analysis of whether bullying or harassment has occurred shall be conducted from the view of a reasonable person under the totality of the circumstances.

e. Bullying and harassment shall be unlawful when it rises to the level that creates any harm to dignity and other human rights in the workplace, causes any level of emotional, psychological, social, or physical harm, otherwise creates an intimidating, hostile, or abusive working environment, or otherwise unreasonably interferes with the working environment of the target of such behavior.

f. A management action shall not be considered bullying if it is carried out with just cause and is conducted in a reasonable manner.

2. It shall be unlawful for any person to aid, abet, incite, compel, or coerce the doing of an act forbidden under this Act or to attempt to do so.

3. It shall be an unlawful employment practice to coerce, intimidate, threaten, or interfere with or otherwise retaliate against any person in the exercise of any right under this Act, including but not limited to filing a claim internally with an employer or externally through any agency or court on the behalf of oneself or other, encouraging one to file such a claim, objecting to behavior one perceives to be in violation of this Act, participating in such claim as an advocate, witness, or complainant, defending oneself from against a claim under this Act, or engaging in any other reasonable participation in a claim under this Act. Any action that would have a chilling effect on a current target or future targets filing a complaint or any other participation in a complaint as a witness shall be considered unlawful retaliation under the Act.

4. It shall be an unlawful employment practice to require any complainant under this Act enter into a non-disclosure agreement.

5. It shall be an unlawful employment practice to require any complainant to enter into any pre-interest binding arbitration agreement addressing any potential unlawful practices under this Act.

Section 7. Employer Responsibility To Assure Worker Dignity and To Prevent, Detect, Remedy, and Eliminate All Forms of Workplace Bullying and Harassment

1. Employers shall have a general duty to provide a workplace free from bullying and moral, psychological, and general harassment and a workplace that protects each employee's personal integrity, dignity, and human rights.

2. Employers shall be required to post notice of employees' rights under this law and to distribute the employer's anti-bullying policy, including an explanation of reporting measures, investigation process, and remedial processes. While posting of such notices does not abdicate an employer from legal liability for workplace bullying, failure to post such notice is a per se violation of this Act, may lead to fines and penalties against the employer, and will make any and all affirmative defenses against a claim of workplace bullying or general or moral harassment unavailable to said employer.

3. Employers shall have a general duty to ensure to take all necessary steps to prevent, detect, remedy, and eliminate workplace bullying and general harassment from their workplaces. At a minimum, they shall put in place a

system to monitor, prevent, and manage workplace bullying and assure that workers are adequately informed and trained on workplace bullying prevention and management. The presence of such a policy does not in itself create an affirmative defense, but the absence of such

a policy is a per se violation of this Act, could lead to fines and penalties against the employer, and will result in affirmative defenses being unavailable against a claim file under this Act.

4. Employers shall take all necessary steps to assure that there be no retaliation against any complainant who has filed a complaint under this Act in good faith.

5. Employers shall take all necessary steps to assure that there be no retaliation against any individual for participating in a complaint as a witness, for taking action as a bystander to prevent or eliminate bullying of a target, or for opposing any behavior made unlawful by this Act.

Section 8. Employer Liability

1. An employer shall be liable for any damages, including economic, compensatory, and punitive damages, to any employee who has been the target of any of the prohibited behaviors in this Act in the scope of their employment, unless the employer can demonstrate they have met all elements of the affirmative defense as established under Section 10 of this Act. An employee is entitled to recover the greater of all actual damages or five thousand dollars ($5000) for each violation of this Act.

2. An employer shall be strictly liable for all damages, including economic, compensatory, and punitive damages, resulting from any prohibited behaviors of this Act carried out by a supervisor of such employer.

3. Any employer who fails to file notice of employees' rights under this act in such a a manner that all employees have reasonable access to such notice shall be subject to fines and

penalties as deemed appropriate by the Fair Work Commission established in Section 12 of this Act.

4. Any employer who fails to implement and notify employees of a workplace bullying prevention policy that includes reasonable reporting, investigatory, remedial, and anti-retaliation provisions shall be deemed in violation of this Act and shall be subject to fines and penalties deemed appropriate by the Fair Work Commission established in Section 12 of this Act. Further, such employer shall not have available the affirmative defenses established in Section 10 of this Act.

5. In civil actions brought under this section, the court shall award to the prevailing party reasonable attorney's fees and costs, including expert witness fees, except that, notwithstanding Section 998 of the Code of Civil Procedure, a prevailing defendant shall not be awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so.

Section 9. Individual Liability

Any individual who engages in workplace bullying, moral, psychological or general harassment, retaliation, or any other prohibited behavior under this Act shall be jointly and severally liable along with their employer for any and all damages including economic, compensatory, and punitive damages.

Section 10. Affirmative Defense

1. An employer may establish an affirmative defense to limit damages for prohibited behaviors under this Act where such behaviors are committed by non- supervisory employees.

2. An employer must show the following in order to establish such defense:

a. The employer took all necessary steps to prevent, detect, and remedy behaviors prohibited under this Act.

b. Such steps shall include at a minimum:

i. Posting notice of employees' rights under this Act;

ii. Establishing an Anti-bullying, Anti-general harassment policy. Such a policy includes at a minimum:

1. A broad reporting procedure;

2. Formal and informal reporting methods;

3. Affirmative steps to detect bullying and harassment in the workplace including periodic workplace audits and climate surveys of the employer workplace;

4. An effective investigatory policy that assures neutral, well-trained investigators; a neutral fact-finding investigation of each claim of bullying and/or harassment; a prompt investigation that begins within 24 hours of the filing of a claim or employer knowledge of a potential violation under this Act; completion of such investigation within a reasonable period time, not to exceed 5 days, unless a clear justification for such extended time exists;

5. An effective remedial process that assures an immediate cessation of any bullying and harassing behavior, that assures that the bullying or harassing behavior shall not re-commence, and that deters future bullying or harassing behaviors throughout the organization;

6. An effective anti-retaliation provision that assures no retaliation occurs against any complainant, target, or other participant in any claim of workplace bullying or harassment.

3. An employer may establish an affirmative defense against a claim of bullying or harassment based on an organizational practice or management action only where they can establish by a preponderance of the evidence that such practice or action was carried out with just cause and meets each of the seven tests of just cause or that such action was taken out of economic necessity. Burden of proof in a claim involving an organizational practice or management action shall entail:

a. The complainant must establish that such action meets the basic elements of workplace bullying (unwanted, objectionable behavior that has the effect of infringing on the human rights of the target or creating an intimidating, hostile, or abusive working environment).

b. The employer must either:

i. Establish that such action was taken out of just cause:

1. The action was based on a reasonable work rule;

2. The employee was notified of such rule and the potential penalty for such rule violation;

3. The employer conducted a sufficient investigation to determine whether the rule was violated;

4. The employer’s investigation was fair, impartial, and provided the employee adequate due process;

5. The investigation provided adequate proof of the violation of the rule;

6. The employer has applied the rule fairly and consistently to all employees;

7. The punishment for such rule violation was reasonable given the seriousness of the offense and the totality of the employee's work record.

ii. Show the action was taken out of economic necessity, such that the employer had no economic option but to take the management action (i.e. laying off employees as a result of economic losses).

c. The complainant will then be afforded an opportunity to show that the employer's preferred reasons for the action were merely pretext to cover up bullying or harassing behavior and/or were not economically necessary.

d. The trier of fact shall make the determination as to whether such management action or organizational practice was either bullying or harassment or justified behavior based on the totality of the evidence presented.

Section 11. Remedies

1. Targets of workplace bullying shall be entitled to all remedies necessary to make such targets whole. Such remedies shall include:

a. Economic damages for lost wages, both back pay and front pay, and any expenses related to treatment related to the bullying

b. Compensable damages to compensate for the pain and suffering and emotional and psychological damages resulting from such workplace bullying

c. Punitive damages as deemed necessary to deter future acts of workplace bullying

d. Injunctive relief, whereby the court may enjoin the defendant from engaging in the unlawful employment practice

e. Equitable remedies

f. Any other relief that is deemed appropriate, including but not limited to medical expenses, psychological treatment, restorative measures, organizational training, and attorney's fees.

2. A complaining party may recover punitive damages under this Act:

a. If the complaining party can demonstrate that the employer engaged in prohibited conduct with intent to injure or with knowing disregard of the protected rights of an aggrieved individual OR

b. The employer failed to meet their obligations under Section 7 of this Act.

3. The remedies provided in this chapter shall be in addition to any remedies provided under any other law, and nothing in this chapter shall relieve any person from any liability, duty, penalty, or punishment provided by any other law.

Section 12. Cause of Action

1. The state shall establish a Fair Work Commission (FWC) to address workplace bullying and to enforce this Act. In the enforcement of this chapter, the Commission shall have the following powers and duties to:

a. Issue enforcement guidance and formulate policies to effectuate the purposes of this Act and make recommendations to agencies and officers of the state or its political subdivisions in aid of such policies and purposes.

b. Receive, initiate, investigate, and seek to conciliate complaints under this Act.

c. Adjudicate and issue orders on complaints alleging violations of this Act. Such adjudication shall be final and binding on all parties and any appeals of such decision shall be filed at the state appellate court level.

d. To require answers to interrogatories, compel the attendance of witnesses, examine witnesses under oath or affirmation in person by deposition, and require the production of documents relevant to the complaint in accordance with this Act both during the investigations of and adjudication of complaints under this Act.

e. To issue right to sue letters to complainants who choose to litigate their claims in the court system of the state rather than pursuing the FWC's adjudication process. Such right to sue letter shall extend the statute of limitations for filing such a complaint to no less than 120 days from the date of the issuance of such letter.

f. To make available to the public information on this Act, grievance procedures, public records of the Commission, and any other information that would further the purposes and intentions of this chapter.

2. Such Commission shall also have the right to represent claimants in judicial proceedings and during the hearing process under the Commission's powers. At the conclusion of the investigation, the Commission may bring the complaint in front of an administrative law

judge to litigate the Commission's determination, recommend appropriate penalties against an employer, and/or engage in mediation between the claimant and employer or issue the claimant a right to sue letter to bring a private claim of action.

Section 13. Statute of Limitations

1. Claimants shall have three years from the last act of bullying or moral, psychological, or general harassment to either file a complaint with the FWC or to file litigation.

2. If a claimant files a complaint with the FWC, the statute of limitations for filing a private cause of action is tolled.

3. Claimants who file with the FWC shall have the later of three years from the date of the last alleged bullying action or 120 days from the issuance of the FWC right to sue letter to file a private cause of action after the Commission issues a right to sue determination.

4. Under this subsection, apprentices, trainees, unpaid interns, volunteers, and independent contractors may file a complaint alleging unlawful bullying and harassment. Nothing in this subsection shall create an employment relationship

under wage and hour provision, workers' compensation, or unemployment insurance.

Section 14. Non-waivable Rights

The rights afforded to targets, witnesses, bystanders, and others harmed by workplace bullying are non-waivable. Complainants may not be required to waive their rights under this law directly or indirectly via collective bargaining agreements, mandatory arbitration clauses, or non-disclosure agreements.

Section 15. Conflict with Laws

1. Nothing in this law should be construed as limiting employee rights under any other law including rights under Title VII of the Civil Rights Act, The Americans with Disabilities Act, the Age Discrimination in Employment Act, and state EEO laws.

2. Nothing in this law should be construed as limiting employee rights under the National Labor Relations Act (NLRA) and/or State Labor Rights laws. Concerted Activity/Section 7 activity under the NLRA as interpreted by the National Labor Relations Board shall not be construed as workplace bullying or moral, psychological, or general harassment.

3. Nothing under this law shall restrict workers from negotiating broader protections of their dignity or protections against workplace bullying or harassment via collective bargaining or other concerted activity.