



Workplace Bullying and Harassment

– 2013 JILPT Seminar on Workplace Bullying and Harassment –



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Foreword

The Japan Institute for Labour Policy and Training (JILPT) held the International Seminar on Workplace Bullying and Harassment in Tokyo on the 27th and 28th of February 2013. We planned a two-day seminar with academics and experts in the field of labor issues. The main purpose of the seminar was to share the situation and ideas for tackling workplace bullying and harassment in selected countries (the UK, France, Germany, Sweden, the US, Canada, Korea and Japan) and the EU, as well as stimulating research activities and policy-making in Japan through cross-national discussions and exchange of views.

In Japan, the Government finally set up Council on Issues of Workplace Bullying and Harassment in the Ministry of Health, Labour and Welfare in July 2011 to think about national policies against this issue which we should have in the future. The existence of workplace bullying is just started to be recognized and few researches on this issue have been done so far in Japan.

To address the problem of workplace bullying and harassment, it is essential that we gain an accurate picture and precise evaluation of actual conditions based on international comparative research. In this respect, the seminar was a great success, with much thought-provoking discussion and insight into the problem and measures against workplace bullying and harassment in each country from a comparative aspect.

This report is a compilation of the papers presented to the seminar. We very much hope that these reports will provide useful and up-to-date information and important policy implications.

Lastly, we would like to express our sincere gratitude to the foreign guests at the seminar, who submitted excellent national papers, for all their cooperation.

June 2013

Kazuo Sugeno
President

The Japan Institute for Labour Policy and Training

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Workplace Bullying and Harassment in the EU and Finland

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Part I: Workplace Bullying and Harassment in the EU

Introduction

Some history

The first book on workplace bullying or harassment “The harassed worker” was written by psychiatrist Carroll M. Brodsky, and published in 1976 in the USA. Psychologist and psychiatrist Heinz Leymann can, however, be seen as a pioneer and initiator of workplace bullying research and the practical work going nowadays on all over the world for the prevention and management of workplace bullying and its negative individual and organizational impacts. Heinz Leymann was originally German, and became a Swedish citizen in mid 1950s. He started to explore bullying (psychological terror) at work in the early 1980s in Sweden, where his work aroused active public debate (Leymann, H. 1986, 1990). A statutory provision against bullying ‘Victimization at work’ (Ordinance AFS 1993:17) was enforced in Sweden in 1993.

Inspired by Leymann’s studies, and studies on school bullying, debate and research on bullying started in early 1990s in Norway and Finland, and soon after that for example in Germany, the UK, Austria, and Ireland. In the UK, Andrea Adams a broadcaster and journalist with her book ‘Bullying at Work’ in 1992 and in France Marie-France Hirigoyen a psychiatrist, psychoanalyst and psychotherapist with her book ‘Le harcèlement moral, la violence perverse au quotidien’ (Stalking the Soul. Emotional abuse and the erosion of identity) in 1998 were important initiators in their own countries. The World Health Organization (WHO) published a booklet: Raising awareness of Psychological Harassment at work in 2003.

During the past ten to fifteen years, interest, national and scientific research and practical work against workplace bullying at work has increased and extended rapidly in Europe, and all over the world.

Definition

In the EU level, there is no single uniform definition of what is meant by bullying or harassment at work. In spite of the lack of a uniform definition, most definitions used by researchers and practitioners share some common features: Accordingly bullying involves negative acts that occur repeatedly, regularly (systematically) and over a period of time,

and the person targeted has difficulties in defending him/herself. In some definitions, the aim of harming the target or intentionality of the behavior is included.

Definitional criteria:

- Wide range of negative acts that may cause psychological harm
- Direct and indirect behaviours
- Work-related, person-related and social exclusion
- Repeated and frequent
- Long duration
- Power imbalance: making it difficult to defend oneself

Bullying at work means harassing, offending, socially excluding someone or negatively affecting someone's work tasks. In order for the label bullying to be applied to a particular activity, interaction or process, the bullying behaviour has to occur repeatedly and regularly and over a period of time. Bullying is an escalating process in the course of which the person confronted end up in an inferior position and becomes the target of systematic negative social acts (Einarsen, Hoel, Zapf & Cooper 2011).

According to the framework agreement on harassment and violence at work by the European social partners, workplace harassment occurs when one or more worker or manager are repeatedly and deliberately abused, threatened and/or humiliated in circumstances relating to work.

Most often the term bullying refers to negative acts inside the workplace, by colleagues, supervisors or managers or subordinates. In some definition and studies also negative behavior by third parties is included, and clients, patients, customers or the like are classified as possible perpetrators.

The terms used

In English varying terms are used in English. Interchangeably with the term 'workplace bullying' the term 'harassment' or 'workplace harassment' is nowadays increasingly used. The term 'workplace harassment' is generally used for example by the European Agency for Safety and Health at work (EU-OSHA) as well as some other European institutions. In some countries, the term 'harassment' refers particularly to sexual harassment. The term 'mobbing' is used in some countries interchangeably with the term bullying. The terms 'mobbing' and 'bullying' are sometimes also used to differentiate between negative behavior by groups and negative behavior by single person.

Workplace bullying and harassment across EU - research findings

The situation with regard to workplace bullying differs quite a lot between European countries. At least some national studies on workplace bullying have conducted in most countries but in some, the level of acknowledgement and recognition of the problem, as well as knowledge about the nature of the phenomenon in general and in organizations and enterprises is still quite low.

Acknowledgement of the problem

In 2008, a survey on violence and harassment at work was conducted among EU-OSHA network of Focal Points (EU-OSHA 2010). The respondents were asked to evaluate if the level of acknowledgement of harassment was appropriate in their country, compared to the relevance/significance of the problem. In the survey, the term harassment referred to ‘repeated, unreasonable behavior directed towards an employee, or group of employees by a colleague, supervisor or subordinate, aimed at victimizing, humiliating, undermining or threatening them.’

Nineteen Focal Points¹ answered the question, and among them thirteen (5 from Old EU Member States and 8 from New EU Member States) reported that the level of acknowledgement of harassment is not appropriate in their country. The level of acknowledgement of harassment was seen to be appropriate only in one New EU Member State, compared to five of the Old ones. If the level of acknowledgement was not appropriate, the respondents were asked to name four main reasons for this. The main reasons were: lack of awareness (9 Focal Points), lack of appropriate tools/methods for assessing the managing the issue (9 Focal Points), limited or lacking scientific evidence (8 Focal Points), and low prioritization of the issue (7 Focal Points). More recent systematic information about the acknowledgement of the problem between the European countries does not exist. Change may, however, have happened during the past years.

Prevalence of bullying and harassment at work

In the Fifth European Working Conditions Survey 2010 by the European Foundation, in all 48,316 employed people (about 1,000 from every country) were interviewed in 34 countries cross Europe, in the EU-27 Member States and in Turkey, Croatia, Norway, Macedonia, Montenegro, Albania and Kosovo. (<http://www.eurofound.europa.eu/surveys/smt/ewcs/results.htm>).

With regard to bullying, the respondents were asked if they had been subjected to bullying or harassment at work in the past year. On average, 4.1% of the respondents in the EU-27 countries reported exposure to bullying or harassment at work. Exposure to bullying or harassment was most common in France (9.5%), in Belgium (8.6%), in the Netherlands (7.7%), Luxemburg (7.2%), Austria (7.2%), Finland (6.2%), Latvia (5.5%), and Ireland 5.5% and most uncommon in Bulgaria (0.6%), Poland (0.7%), Italy (0.9%), Slovakia (1.2%), and Turkey (1.3%). Women reported bullying or harassment slightly more often (4.4%) than men (3.9%). In most countries women reported bullying or harassment more often than men, e.g. Netherlands (female 9.4%, male 6.3%), Finland (female 8.2%, male 4.2%), Denmark (female 3.9%, male 2.5%). In some countries no difference was found, e.g. Germany (female and male 4.6%). In a few countries, men reported being subjected to bullying and harassment somewhat more often than women, e.g. France (female 8.4%, male 10.5%) and Greece (female 2.8%, male 3.7%).

The prevalence rates found in national studies have often differed from the results of the EWCS, and the estimates have also been found to vary extensively both between and within countries. The strategies for the measurement of bullying have considerable

¹ Focal Points made up in each EU Member State, as well as in Candidate Countries and EFTA countries constitute the Agency’s main safety and health information network. They are nominated by each government as the Agency’s official representative in that country, and they are normally the national authority for safety and health at work. Working with national networks including government, workers’ and employers’ representatives, the focal points provide information and feedback which help to support Agency initiatives.

meaning, and must be taken into consideration when results across studies are compared. It has been shown that differences between methods lead to inconsistent findings that cannot be compared across studies.

The self-labeling (self-judgement) method is probably the most frequent used approach. In this method, participants are given a single-item question asking whether or not they have been bullied within a specific time period. In some studies, the respondents have been offered a definition of bullying before being asked whether or not they have experiences in the workplace that corresponds to the presented definition. In some studies, the question about bullying has been asked without a preceding definition. In the behavioral experience method (operational method) respondents are presented with an inventory that includes various types of negative acts. The respondents are asked to report how frequently they have been exposed to the different behaviors listed in the inventory within a given time period. The respondent is classified as a target of bullying if he/she has been exposed to at least one negative act per week over a period of at least six months. It has also been suggested that two negative acts are required to classify the experience as bullying (Mikkelsen & Einarsen 2001, Nielsen, Matthiesen & Einarsen 2010, Nielsen, Notelaers & Einarsen 2011).

For example, in Italy a survey among the general working population in Lombardy used the inventory method. The researchers classified the respondent as a target of bullying if he/she had been exposed to at least two negative acts on weekly bases. In all, 7% of the respondents were classified as targets of bullying (EWCS Italy 0.9%) (Campanini, Punzi, Costa & Conway 2008). In the Finnish Work and Health interview survey 2009 representing the Finnish wage earners, 6% of the respondents reported being bullied at work at the time of the survey (Vartia 2010). In the survey, the respondents were given a definition of bullying, and after that they were asked if they were exposed to that kind of behavior. The result corresponds very well with the results by the EWCS in 2010 (6.2%).

By means of a meta-analysis, 102 estimates of prevalence of workplace bullying from 86 different samples from Scandinavia, other European countries and non-European countries were accumulated and compared. A rate of 11.2% was found for studies investigating self-labeled victimization from bullying based on a given definition of bullying, a rate of 14.8% was found for behavioral measure studies, and 18.1% for self-labeling studies without a given definition (Nielsen, Matthiesen & Einarsen 2010).

Cross cultural research challenging because it is prone to many kinds of sources of error. With regard to workplace bullying, for example the awareness and recognition of the phenomenon is considerable higher in some countries compared with some others. In some countries research on workplace bullying has been going for a long time and the phenomenon is generally known while in some countries, discussion and research is still in its early stage. This may have some impact on recognition of the phenomenon, and on preparedness to report experienced bullying. It has been suggested that long lasting bullying cases are very similar across the world, but there may be differences between cultures for example in classifying some specific behavior as negative or hostile or not.

Adverse social behavior

In the Fifth EWCS, also an index score of adverse social behavior was calculated. Respondents who had been subjected to bullying, violence and sexual harassment in the past year and/or verbal abuse, humiliating behavior and unwanted sexual attention in the past month were classified as being subjected to adverse social behavior. Reported levels

of subjection to adverse social behavior were lowest in Kosovo (3%), Turkey (5%), Cyprus (7%) and Italy (8%) and highest in Austria (22%) and Finland (21%). In all the participating countries, on average about 13% of men and about 15% of women were subjected to adverse social behavior. The levels of subjection to adverse social behavior were highest in health care sector and transport, and lowest in agriculture and construction (Eurofound (2012)).

The perpetrators – status and gender

The findings as regards the status of the perpetrator vary across countries. In Finland and in Sweden the perpetrators have been reported to be colleagues somewhat more often than supervisors or about equally often. Also Norway the perpetrators have been identified people in superior positions as offenders in approximately equal numbers to peers. In a Danish study, colleagues were reported to be the main perpetrators in more than 70% of the cases. In the Nordic countries, some but only very few are bullied by their subordinates. In contrast, British studies have consistently found supervisors or line-managers to be identified as perpetrators. Also in a study in the transport and communication sector in Spain, 52.5% of the respondents reported that they were bullied exclusively by supervisors, 18.4% were bullied exclusively by colleagues, and 7.1% by both superiors and colleagues. In an analysis with 40 samples from 19 European countries, 65.4% of the targets were bullied by supervisors, 39.4 % by colleagues, and 9.7% by subordinates. The difference between the Nordic countries and central European countries can be due to some cultural differences. It has been suggested that low power differentials and feminine values prevail in the Scandinavian countries. In such countries, the abuse of formal power is more sanctioned (EU-OSHA 2010a, Zapf, Escartin, Einarsen, Hoel & Vartia, 2011, Moreno-Jimenez, Munoz, Salin & Morante Benadero, 2006).

Studies for example in Sweden, Norway, the UK, Austria, and Germany have suggested that women are bullied by both other women and men, but that men are most often bullied by men. Women are sometimes exclusively bullied by men, but cases where men are exclusively bullied by women are rare. It has been suggested that these findings may be explained by the different power positions of men and women in organizations (Zapf et al. 2011).

Concern regarding bullying or harassment at work and procedures in place to deal with in the organization

In the European Survey of Enterprises on New and Emerging Risks (ESENER) by the European Agency for Safety and Health at Work (EU-OSHA) the aim was to explore the views of managers and health and safety representatives how health and safety risks (including bullying and harassment at work) are managed in their organizations. In the survey, in all 28,648 managers, and in all 7,226 health and safety representatives were interviewed in EU Member States and Croatia, Turkey, Norway and Switzerland (EU-OSHA 2010b).

On average, bullying or harassment at work was a major concern for 20% of both managers and safety and health representatives. Concern regarding bullying or harassment was highest among managers in Turkey where over 70% of managers reported it to be a major concern for them. Concern regarding bullying and harassment was higher than on average also for example in Portugal (major concern over 50% of managers) Romania

(about 40%), and Norway (about 40%). Concern regarding bullying and harassment was very low in Slovenia (major concern 0%, some concern 5%), Sweden (major concern 0%, some concern 25%), and also in Hungary (no concern more than 95%), Estonia (no concern about 90%).

The level of concern for bullying or harassment at work was substantially lower than concern for work-related stress. In all, 37% of managers and 35% of safety and health representatives reported work-related stress to be a major concern in their establishment.

Concern regarding workplace violence, bullying and mobbing was also assessed in the PRIMA-EF (Psychosocial Risk Management – European Framework) project in 2007 among a group of stakeholders in 27 European countries. The respondents were asked if they thought that workplace violence, bullying and mobbing represented important occupational health concerns in their country. The results (Table 1) revealed a remarkable difference between the old and the new EU Member States and between different stakeholders (Natali, Deitingner, Rondinone & Iavicoli 2008).

Table 1: Do you think that workplace violence, bullying and mobbing represent important occupational health concerns in your country? (n=75)

	TOTAL	COUNTRIES		STAKEHOLDERS		
		EU 15 Countries	New EU 27 Countries	Employers' association	Trade Union	Government
yes	65 %	74 %	53 %	43 %	71 %	69 %
no	28 %	26 %	31 %	43 %	25 %	25 %
don't know	7 %	0 %	16 %	14 %	4 %	6 %

Procedures in place to deal with bullying and harassment

Anti-bullying policies and procedures to deal with the issue are often recommended by both researchers and practitioners for the prevention and management workplace bullying in organizations. Procedures in place to deal with bullying or harassment in the establishment were assessed in the ESENER survey. In the EU-27 Member States, 30% of establishments had procedures in place to deal with bullying and harassment at work. Procedures were most common in establishments in Ireland (90%), the UK (84%), Sweden (79%), Finland (72%), and Belgium (71%), and most unusual in Cyprus where 79% of managers reported that there were no procedures in place to deal with bullying or harassment in their establishment. Procedures were uncommon also in France (no procedures 72%), Portugal (71%), Poland (67%), Italy (62%) and Spain (61%). One response alternative was also “these problems are not an issue in our establishment.” In Malta 61%, in Bulgaria 59%, and in Lithuania 47% of the managers reported that bullying and harassment are not an issue in their establishment.

Table 2 shows that the connection between concern regarding bullying and harassment and procedures to deal with these issues in the organizations is not systematic.

Table 2: Concern regarding bullying and harassment among managers and health and safety representatives, and procedures in place in the establishment to deal with bullying and harassment in some European countries (ESENER 2010) (%)

	Major concern, managers	Major concern, health and safety representatives	Bullying is not an issue in our establishment (managers)	Procedures in place to deal with bullying in the establishment (managers)
Total of 31 countries	20	20	18	33
Turkey	73	67	7	27
Portugal	46	69	18	10
Norway	45	44	10	59
Ireland	19	7	2	90
Finland	1	3	9	72
Sweden	1	1	5	79
Belgium	17	27	5	71
France	27	35	3	24
Denmark	7	7	17	32
Estonia	1	0	69	3
Hungary	2	0	44	6
Malta	5	8	61	17

Procedures in place in the establishments to deal with bullying and harassment seem to be more common in bigger organizations than in smaller ones. In big organizations, managers also regard bullying and harassment as an issue more often than smaller ones (Table 3).

Table 3: Procedures in place to deal with bullying in the organization and concern regarding bullying in different size establishments in EU-27 countries (%)

	Procedures in place to deal with bullying	Bullying is not an issue in the organization
- 50	26	21
50 - 149	34	17
150 - 499	42	13
500 -	53	10

According to ESENER survey, the most important drivers for having in place procedures for bullying and harassment are general level of OSH management (occupational safety and health management) and absenteeism, and the most important barriers for having in place procedures for bullying and harassment lack of technical support and guidance and lack of resources. Slightly weaker drivers for having procedures to deal with bullying and harassment in the establishment were concern for bullying/harassment and legal obligations (EU-OSHA 2012).

Request to tackle bullying and harassment at work

Participation of health and safety representatives and other workers' representatives in the management of safety and health differ across countries in Europe. According to the ESENER survey, the existence of any type of formal employee representation with relevance for safety and health issues is highest in Italy (100%), Norway (about 95%), and Denmark (over 90%), and lowest in Greece (less than 20%), and Portugal (less than 40%). On average the corresponding rate in all 31 participating countries was about 70%.

In the fifth EWCS, 52% of the employees in EU27 reported having an employee representative in their organization; most often in the Nordic countries, Norway, Finland, Sweden, Denmark, and in Kosovo (about 75-90%), and most seldom in Portugal, Turkey, Estonia, and Greece, Bulgaria (less than 40%) (Eurofound 2012).

In the ESENER survey, health and safety representatives were also asked if they had been asked to tackle bullying and harassment in the workplace during the past three years. Health and safety representatives received this kind of requests most often in Germany, Finland and Belgium, and most seldom in Lithuania, Hungary, and Estonia (Table 4).

Table 4: Requests to tackle bullying or harassment in the last 3 years (health and safety representatives) (%)

Have you in the last 3 years received requests to tackle bullying or harassment? (Total 31 countries 22%)	
Most often:	Germany 43%, Finland 41%, Belgium 40%, France 33%, Norway 32%, UK 29%, Switzerland 29%, Sweden 24%, Austria 22%
Between:	Greece 18%, Spain 18%, Ireland 18%, Netherlands 18%, Slovenia 18%, Poland 16%, Italy 15%, Czech Republic 14%, Cyprus 12%, Luxembourg 12%, Romania 11%
Most seldom:	Lithuania 0%, Hungary 1%, Estonia 2%, Slovakia 3%, Portugal 4%, Bulgaria 7%, Turkey 7%, Latvia 8%, Malta 8%, Croatia 10%

In Table 5, some European countries have been grouped on the basis of the prevalence of bullying, procedures in place in organization to deal with bullying and harassment at work.

Table 5: Prevalence of bullying, procedures in place to deal with bullying and harassment at work in the enterprise, concern regarding bullying and harassment in some EU countries (EWCS 2010, EU-OSHA 2010)

Procedures common, low concern

Sweden:	2.8%,	71% procedures,	75% no concern
Finland:	6.2%,	62% procedures,	70% no concern
Netherlands:	7.7%,	50% procedures,	85% no concern

Procedures uncommon, low concern

Estonia:	1.6%,	2% procedures,	93% no concern
Hungary:	2.2%,	3% procedures,	96% no concern
Lithuania:	4.7%,	5% procedures,	95% no concern
Greece:	3.4%,	5% procedures,	85% no concern
Slovenia:	4.8%,	10% procedures,	95% no concern
Austria:	7.2%,	8% procedures,	81% no concern

High concern, low prevalence

Turkey:	1.3%,	25% procedures,	75% major concern
Portugal:	2.1%,	8% procedures,	52% major concern
Romania:	1.8%,	18% procedures,	42% major concern

High prevalence

France:	9.5%,	20% procedures,	23% major / 50% no concern
Belgium:	8.6%,	65% procedures,	18% major / 63% no concern

Regulatory standards of relevance to the management of psychosocial risks and workplace bullying and harassment in the European level

European framework directive 89/391/EEC

Throughout Europe, employers are legally responsible for the health and safety at work or their workers. The EC Framework Directive 89/391/EEC (the Framework Directive) sets out employers' general obligations to address 'all types of risk' in accordance with the principles of prevention and the continuous improvement of workplace conditions in relation to health and safety. The Directive asks employers to ensure workers' health and safety in every aspect related to work, 'addressing all types of

risk at source.’ The Directive does not, however, include the terms ‘psychosocial risk’ or ‘work-related stress.’ (See an overview of European standards relevant for psychosocial risk management Leka et. al. 2011.)

The autonomous framework agreement on harassment and violence at work

The autonomous framework agreement on harassment and violence at work was signed in 2007 by the European social partners, ETUC/CES, BUSINESSEUROPE, UEAPME and CEEP. According to the agreement workplace harassment occurs when one or more worker or manager are repeatedly and deliberately abused, threatened and/or humiliated in circumstances relating to work. Harassment may be carried out by one or more managers or workers, with the purpose or effect of violating a manager’s or worker’s dignity, affecting his/her health and/or creating a hostile work environment. The agreement aims to increase awareness and understanding among employers, workers and their representatives of workplace harassment and violence and to provide employers, workers and their representatives at all levels with an action-oriented framework to identify, manage and prevent problems of harassment and violence at work. (<http://www.tradeunionpress.eu/Agreement%20violence/Framework%20Agreement%20Harassment%20and%20Violence%20at%20Work2.pdf>)

According to the agreement, enterprises need to have a clear statement emphasizing that harassment and violence will not be tolerated. The statement specifies procedures to be followed where cases should arise. According to the agreement, a suitable procedure will be underpinned but not confined to the following:

- It is of interest of all parties to proceed with the necessary discretion to protect the dignity and privacy of all.
- No information should be disclosed to parties not involved in the case.
- Complaints should be investigated and dealt with without undue delay.
- All parties involved should get an impartial hearing and fair treatment.
- Complaints should be backed up by detailed information.
- False accusations should not be tolerated and may result in disciplinary action.
- External assistance may help.

The agreement also states that “if it is established that harassment and violence has occurred, appropriate measures will be taken in relation to the perpetrator(s). This may include disciplinary action up to and including dismissal,” and that “the victim(s) will receive support and, if necessary, help with reintegration.” Employers, in consultation with workers and/or their representatives, should establish, review and monitor their procedures to ensure that they are effective both in preventing problems and dealing with issues as they arise.

The agreement was supposed to be implemented and monitored within three years of the signing at the national level. Evidence from different countries shows that the agreement has evoked activities at national levels and contributed to raising public awareness of the issue. In some countries employee and employer organizations have concluded further agreements for the implementation of the agreement at national level, information about the agreement has been distributed to the members of the workers’ and employers’ organizations, and working groups have been established to plan the implementation of the agreement and to develop material to support work against

harassment. Therefore the agreement is seen to raise public awareness of the issue. (http://resourcecentre.etuc.org/linked_files/documents/pdf_Implementation_HV_table_2008-ENpdf?PHPSESSID=8fb1dcbc8e63ae59458256d129f3f7f8)

It seems, however, that in many countries awareness of the agreement is still rather low in organizations both among employers and workers' representatives. Also the awareness about the existence of the agreement is low in many countries, and among employers and workers' representatives.

Interventions for the prevention and management of bullying at work

Approaches used in the prevention and management of workplace bullying differ in many ways. A distinction is commonly made between primary, secondary and tertiary prevention on the one hand, and between organizational, job/task-level and individual orientation, on the other. In addition, a further fourth level of prevention can be identified, that of policy-level interventions, aimed at bringing about change through their influence on the macro level nationally and internationally (e.g. Vartia & Leka 2011). Primary level interventions are proactive by nature and aim to prevent the harmful phenomena or effects emerging in the first place by reducing the risks. Secondary stage interventions aim to reverse, reduce or slow the progression of the situation or of ill-health and/or to increase the resources of individuals. Tertiary stage interventions are rehabilitative by nature, aiming at reducing the negative impacts caused by different occupational hazards, restoring the health and well-being of employees as well as restoring a safe and healthy workplace.

In relation to bullying, organizational or employer-level interventions aim to influence the attitude towards bullying, to develop organizational culture where there is no room for bullying, and to introduce policies and procedures for prevention, as well as intervention when a problem occurs. The job-level strategies aim to prevent and tackle the problem by influencing the work environment and the functioning of the work unit. Finally, individual level interventions aim to change characteristics of the way individuals interface with the job, such as perceptions, attitudes or behavior or the individual's health and ability to do their job. In Table 6, the different levels of interventions and some examples are presented.

Table 6: Different levels and some examples of bullying interventions (taxonomy adopted from Murphy & Sauter, 2004, Leka et. al. 2008b, see also Hoel 2008)

LEVEL OF WORK ORGANISATION INTERVENTIONS	STAGE OF PREVENTION		
	Primary interventions	Secondary interventions	Tertiary interventions
Society/policy	Laws/regulations Collective agreements	Court case Industrial tribunal	Provision of rehabilitation opportunities

Organisation / Employer	Anti-bullying policies Development of organisational culture, the culture of respect Management training Organisational surveys	Handling procedures Mediation Investigation of complaints	Corporate agreements Programs and contracts of professional after-care
Workplace/ Group/Task	Psychosocial work environment-redesign Risk analysis Training (awareness, recognition, insight of the phenomenon, research based knowledge)	Training (e.g. conflict management, investigation skills) Awareness raising, exploration of the situation Case analysis, conflict/case resolution, Mediation	Group recovery programmes
Individual	Training	Social support Counselling	Therapy Counselling Physical activities Redress

The focus in activities differs across countries. In many countries, society-, organizational- and/or workplace level measures are preferred, in some the perspective is more in individual level. In the organizations, training for different actors, management training, training for health and safety representatives and implementation of anti-bullying policies and guidelines seems to be the strategies most often used in European workplaces to tackle workplace bullying.

Policies have been recommended and adopted in many European countries and organizations to counteract workplace bullying. Bullying and harassment policy is the employer's statement of intent and a summary of processes as regards bullying and harassment in their organization (Rayner & Lewis 2011). The role of policy in the management of workplace bullying is central to all concerned. It has been suggested that an anti-bullying policy should include, for example, a clear statement from management that any kind of bullying and harassment is unacceptable, reference to legislation and other relevant regulations, responsibilities as well as allocation of roles and responsibilities of management and other players. In addition, the policy should include clear guidance for the persons experiencing bullying, for witnesses, and for the persons accused of bullying, complaint procedures, information on support mechanisms, measures to prevent bullying in the organization, as well as measures to monitor and evaluate the policy (Einarsen & Hoel 2008, Leka & Cox 2008).

From the experience it has been learned that the way the policy is written and implemented is extremely important. The policy should be developed in cooperation with the employer, employees' representatives/safety and health representative, union representative (occupational health care, external expert). The policy must be properly communicated to the whole personnel, and promoted by embedding it in training, communication, induction etc.

Few studies have, however, examined the effectiveness of interventions for the prevention and management of workplace bullying so far. With regard to policies, some evidence have been found of decrease of bullying when policy has been used as part of a broader 'zero tolerance' approach with for example compulsory training for the whole personnel (Pate & Beaumont 2010). It has also been suggested that a well-designed and coordinated anti-bullying policy can work, but conversely a policy that is designed by one department in isolation from users and other service deliverers can have no impact at all (Rayner & Lewis 2011). Some slight positive results have also been achieved with management training.

Long-term active work seems to produce positive results. Norway is an example of such work. In addition to active research, awareness raising, communication, publication of reports and books about bullying, training and support for organizations etc., some years ago a nation-wide campaign "The Bully-Free Workplace" (Jobbing uten mobbing) was carried out in cooperation between the Norwegian government and the social partners in Norway (<http://www.arbeidstilsynet.no/binfil/download2.php?tid=97306>). National studies suggest that the prevalence of bullying has decreased in Norway during the past twenty years; in 1996, 8.6% of the respondents from a variety of sectors reported being bullied, 4.5% were severely bullied. In 2005, the corresponding figures were 4.6% and 2% (Nielsen, Skogstad, Matthiesen et al. 2009).

In Germany, rehabilitation of bullying victims with inpatient therapeutic treatment in a specialized hospital/clinic (Berus hospital) has shown very positive results (Schwickerath & Zapf 2011).

Lessons learned from interventions for the prevention and management of workplace bullying

Planning and implementing successful and effective interventions for bullying and harassment in organizations is challenging. Work with organizations has taught that for the implementation of interventions for bullying in organization to be successful:

- Commitment of management and supervisors is crucial.
- In organizations, interventions should firstly be focused at managers and superiors, who have the power of decisions e.g. work organization, and have the responsibility on the health and well-being of employees.
- Those involved in the interventions should participate actively and be consulted in the development of the intervention strategy.
- Readiness of the organization and employees to take action.
If awareness and recognition of the problem is not adequate in the workplace, resistance to interventions may appear.
- Mutual understanding about the phenomenon is important.

- Training must be given to managers and the critical mass of the staff.
- Multifactor approach is needed: intervention for the prevention of bullying need to take into account the complex nature of the phenomenon, and its multifactor antecedents.
- The aims of the interventions and the overall importance of the activities should be agreed upon by both management and employees.
- The intervention should be designed to be implemented in a systematic and step-wise manner, with the aims, objectives and implementation strategy.
- The intervention must have a theoretical rationale, which should be based on empirical and clinical findings.
- Continuous and active communication among all stakeholders is crucial.
- Evaluation; an evaluation strategy clearly linked to the outlined aims and identified problems should be developed. Both the implementation process and the outcomes of the interventions should be systematically assessed.
- External consultants involved in bullying interventions should adopt a neutral and impartial role.

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Other resources

Code of Practice for Employers and Employees on the Prevention and Resolution of Bullying at Work
http://www.hsa.ie/eng/Publications_and_Forms/Publications/Occupational_Health/Code_of_Practice_for_Employers_and_Employees_on_the_Prevention_and_Resolution_of_Bullying_at_Work.html

European Survey of Enterprises on New and Emerging Risks. Data
<https://osha.europa.eu/en/riskobservatory>
www.esds.ac.uk/findingData/snDescription.asp?sn=6446&key=esener, more information
help@esds.ac.uk

ETUC/BUSINESSEUROPE-UEAPME/CEEP (2009). Implementation of the ETUC)BUSINESSEUROPE-EIAPME/CEEP Framework Agreement on Harassment and Violence at Work.

http://resourcecentre.etuc.org/linked_files/documents/pdf_Implementation_HV_table_2008-ENpdf?PHPSESSID=8fb1dcbc8e63ae59458256d129f3f7f8

Sexual harassment in EU Member States.

<http://www.unece.org/fileadmin/DAM/stats/gender/publications/MultiCountry/SexualHarassmentReport.pdf>

Part II: Workplace Bullying and Harassment in Finland

Introduction

In Finland research, communication and practical work to address workplace bullying began in early 1990s. An article which was based on Heinz Leymann's studies and writings in Sweden and writings was published in the biggest Finnish newspaper in June 1989. It aroused a lot of interest and discussion, and many people who themselves were exposed to systematic negative treatment in their workplace, said that they got a word for their experience. During the past twenty years research has been carried out e.g. on the prevalence on bullying, antecedents and consequences of bullying, as well as measures adopted in organizations to counteract bullying at work.

Trade unions are strong in Finland, and trade union representatives (shop stewards) and particularly safety and health representatives are active players in all health and safety issues, including activities to tackle workplace bullying and harassment. According to the Occupational Health Care Act, the employer has to arrange occupational health care services for all employees. Also occupational health care personnel, particularly occupational health psychologists, take part in activities for the prevention of workplace bullying. They give support and advice for line-managers on how to investigate and resolve cases, support those who perceive themselves as targets of bullying, and sometimes also those accused of bullying.

Most organizations in Finland carry regularly out work environment/work atmosphere surveys. In these surveys, a variety of psychosocial work environment factors/risks are assessed. Nowadays some organizations include also assessment of exposure to negative acts and bullying as well as observed/witnessed bullying in the workplace in their work atmosphere surveys.

Current situation

Prevalence of bullying at work

In the Work and Health Survey by the Finnish Institute of Occupational Health, the prevalence of workplace bullying has been assessed every third year since 1997. In the survey, bullying is defined "Psychological violence and bullying at work means negative, oppressing and insulting treatment that is continuous and repetitive" and then the respondent is asked if he or she is exposed to this kind of negative behavior at the present moment or if he or she has been exposed to this kind of negative behavior before (Vartia 2010).

As Table 7 shows no systematic change in the prevalence of bullying, increase or decrease, has happened during the past fifteen years. It seems that bullying is more prevalent in the municipal sector than in private sector, and that the risk for becoming

bullied is higher in health care and social work as well as in education than in other branches.

Table 7: Self- labeled bullying, for the moment (Work and Health in Finland - interview studies 1997-2012)

	1997	2000	2003	2006	2009	(2012)
All	3.6	4.4	2.9	5	6	(4)
Men	2.8	3.4	1.6	3	4	
Women	4.3	5.3	4.0	6	8	
Private companies	3.1	3.8	2.5	4	5	
Government sector	6.3	3.4	1.6	4	4	
Municipal sector	4.4	7.0	5.1	7	10	
Health and social work	4.4	6.6	5.5	7	10	
Education		6.2	6.3	6	13	

Prevalence of workplace bullying and harassment have been assessed regularly also in the Finnish Quality of Work Life Surveys by the Statistics Finland since 1997 (Lehto & Sutela 2009). These face-to-face interview surveys cover entire wage and salary earning population in Finland. The results have been very similar to those of the Work and Health in Finland survey. In 1997, 3% (women 4%, men 2%), in 2003, 4% (women 5%, men 2%), and in 2008, 4% (women 5%, men 3%) of the respondents experienced bullying at work at the time of the survey. In 1997, 5% of the respondents had observed continuous bullying in their workplace, both in 2003 and in 2008 the corresponding figure was 6%.

Gender differences

Both studies suggest that women are exposed to bullying at work slightly more often than men. In a study among prison officers, women reported exposure to bullying slightly more often than men but the difference was not statistically significant (Vartia & Hyyti 2002) but in a study among business professionals, women reported considerable more bullying than men did (women 12%, men 5%) (Salin 2001).

Gender seems to be an important determinant also more widely. In a study analyzing the significance of gender for whether non-observing third parties label negative behavior as bullying it was found that the gender of the target, the gender of the perpetrator and the gender of the non-observing third party were all important for whether negative behavior was perceived as bullying. The study also showed that men conceptualized bullying as an individual problem more often than women, and women to a greater extent conceptualized

it as an organizational problem, and more strongly emphasized both organizational antecedents and organizational consequences (Salin 2011).

Perpetrators – status and gender

The findings concerning the status of the perpetrator have varied somewhat. In the Working Conditions Surveys 2003 and 2008 by the Statistics Finland, colleagues were identified as perpetrators most often by both men and women (Lehto & Sutela 2009). Among prison officers, women were bullied most often by their colleagues (74% of the targets), but men were bullied by their colleagues (49%) and their supervisors (43%) equally often (Vartia & Hyyti 2003). Among business professionals, women were bullied by superiors and colleagues in approximately equal proportions. Moreover, one-fourth of the women were bullied by their subordinates. The majority of the men classifying themselves as bullied were bullied by superiors. In addition, half of the men reported colleagues on the same levels among the perpetrators. None of the men reported being bullied by subordinates (Salin 2003).

Antecedents and causes of workplace bullying

Finnish studies on antecedents of workplace bullying have mainly explored the meaning of work environment and organizational factors behind bullying. Of the features of the functioning of the work unit, poor information flow, lack of mutual conversations about the tasks and goals of work, and insufficient possibilities to influence matters concerning oneself in the workplace, and of leadership practices, an authoritarian way of settling differences of opinion in the workplace was found to be connected with the experience of becoming bullied at work among municipal employees. Also the general climate in the workplace was associated with perceived exposure to bullying (Vartia 1996).

Salin (2003), writes about the ways of explaining workplace bullying, and classifies the organizational antecedents into three groups: enabling factors (e.g. perceived power imbalances, low perceived costs), motivating factors (e.g. internal competition, reward systems), and precipitating or triggering factors (e.g. downsizing and restructuring, organizational changes).

National legal regulations

Occupational Safety and Health Act

The valid Finnish Occupational Safety and Health Act (738/2002) came into operation on 1.1. 2003, and includes a special section on harassment and other inappropriate behavior at work. The section on harassment is reactive by nature. Harassment and other inappropriate treatment are also mentioned in the general obligations for employees. (in English: <http://www.finlex.fi/fi/laki/kaannokset/2002/en20020738.pdf>)

28 § Harassment

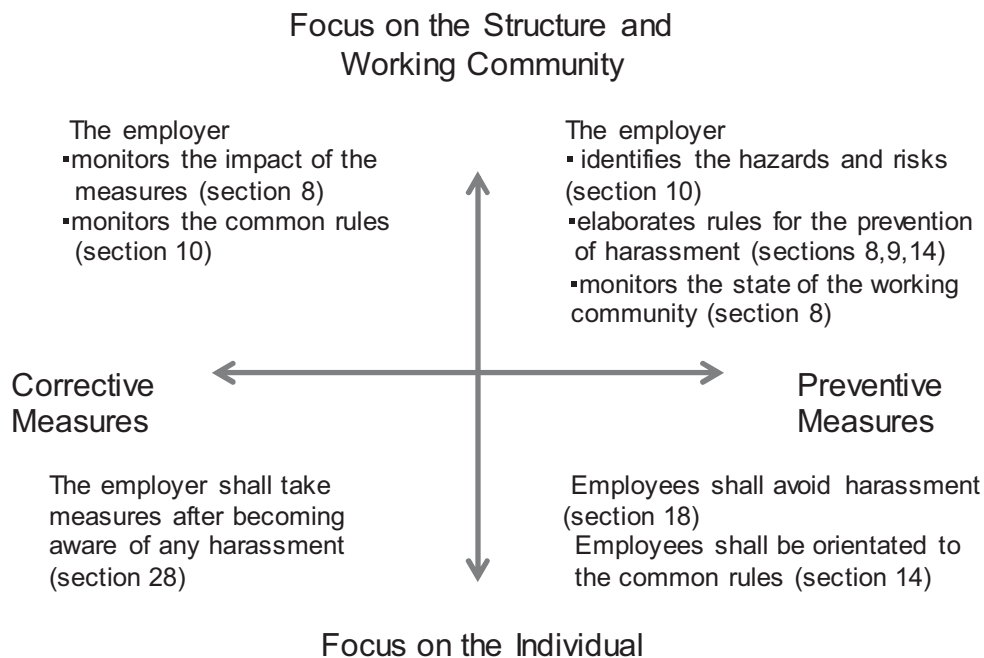
If harassment or other inappropriate treatment of an employee occurs at work and causes hazards or risks to the employee's health, the employer, after becoming aware of the matter, shall by available means take measures for remedying this situation.

18 § Employees' general obligations (3)

Employees shall avoid such harassment and other inappropriate treatment of other employees at the workplace which causes hazards or risks to their safety or health.

The Act includes also other sections which are significant for the prevention and management of workplace bullying, and inappropriate behavior (Figure 1).

Figure 1: Dimensions in preventing harassment at work and the new Occupational Safety and Health Act (738/2002)



With relation to bullying, also Section 25 'Avoiding and reducing workloads' is relevant; If noticed that an employee while at work is exposed to workloads in a manner which endangers his or her health, the employer, after becoming aware of the matter, shall be available means take measures to analyze the workload factors and to avoid or reduce the risk.

The Act obliges the employer/manager/supervisor to take action when he/she receives information about inappropriate treatment and bullying. If the perpetrator is the supervisor or other a manager it is his/her superior who is to take action to investigate and resolve the situation. Most often information about harassment or bullying comes from the person who perceives him/herself as a target of bullying but information can also come from a colleague who has observed inappropriate behavior and bullying or from the health and safety representative or from occupational health care. Guidance and training is available for supervisors on the basic principles of the investigation (e.g. equity, impartiality, objectivity, openness to all kinds of solutions), and on how to carry out the investigation (e.g. what kind of information it is necessary to collect from the person who perceives him/herself as bullied and from the person accused of bullying).

If the employer doesn't take action the employee is advised to contact occupational safety and health authorities/ inspectors. The Occupational Safety and Health Act has been in force for ten years, and most employers are nowadays aware of the "Harassment"

section, and their duties on the bases of the Act. Also safety and health representatives, shop stewards, occupational health care personnel, and most employees are familiar with the section on harassment and inappropriate behavior. The legislation has also activated and pushed organizations to draw-up and implement policies and procedures for the prevention of bullying and resolving the cases. Many organizations also arrange training for the whole personnel, and particularly for line-managers. Trade unions and other training institutions arrange training for safety and representatives and shop stewards.

The section on harassment is regarded as necessary and in principle good but complicated and open to various interpretations. For example it has been noticed that the construct “harassment and other inappropriate treatment that causes hazards or risks to the employee’s health” is inaccurate and open to interpretations. It is clear that “causes risk to one’s health” refers to serious and long term situation, but often it is unclear when the duty to take action actualizes. Some safety and health inspectors find it sometimes difficult to judge when the actions taken by the employer have been sufficient. The legal praxis has been somewhat unestablished. In the legal praxis it has been regarded that the supervisor should have understood that certain acts can be a risk for the employee’s health without any complaint of his/her behaviour.

In the Act, the terms harassment and other inappropriate treatment are used. In the workplaces, however, another word is most often used for continuous negative treatment. This use of several terms brings about confusion in organizations. Sometimes when employees report experience of inappropriate treatment by their supervisors, the investigation of the situation concludes that the behavior of the supervisor has not been inappropriate but behavior that is included in the management prerogative.

The challenges of today are that there are too many lawsuits because the employer has not taken adequate actions, and that although training is arranged for superiors and managers, many supervisors and managers don’t have the necessary expertise to investigate and resolve the situations. If the superior has not the necessary recourses or for some other reason doesn’t want to investigate the situation by him/herself, for example an external consultant or occupational health care psychologist can collect the necessary information and lead the necessary meetings. The employer holds, however, the responsibility for the resolving the situation and stopping the bullying.

The Act on Occupational Safety and Health Enforcement and Cooperation on Occupational Safety and Health at Workplaces

The Act on Occupational Safety and Health Enforcement and Cooperation on Occupational Safety and Health at Workplaces (44/2006) enacts on the cooperation between employers and employees on safety and health issues. According to the act, the goal of the cooperation is to improve the interaction between the employer and the employees, and to make it possible for the employees to participate in and influence the handling of matters concerning safety and health at the workplace. The issues to be handled in cooperation between the employer and employees include e.g. matters immediately affecting the safety and health of any employee, and any changes in those matters; principles and manner of investigating risk and hazards at the workplace, as well as such factors generally affecting the safety and health of employees that have come up in connection with the investigation or a workplace survey carried out by and occupational health care organization; development objectives and programmes relating to workplace health promotion of otherwise affecting the safety and health of employees.

According to the act, at workplace where at least ten employees work regularly, the employees shall from among themselves choose an occupational safety and health representative and two vice representatives to represent them in the cooperation with the employer and to keep contact with occupational safety and health authorities. In other workplace, too, the employees can from among themselves choose the representative. At workplaces where at least 20 employees work regularly, an occupational safety and health committee shall be established for a period or two years at a time. Both the employer and employees of the workplace are represented in the committee.

Occupational Health Care Act

According to the Occupational Health Care Act (1382/2001) it is the duty of every employer to arrange occupational health care for all employees. The Act enacts also on the content and organization of the occupational health care provided. The occupational health care include e.g. the following: investigation and assessment of the healthiness and safety of the work and the working conditions through repeated workplace visits and using other occupational health care methods, having regard to exposure substances in the workplace, the workload, the working arrangement and the risk of accidents and violence; employees' health, working capacity and functional capacity, including any special risk of illness caused by the work and the work environment.

Measures taken to tackle workplace bullying in Finland

During the past fifteen years, training, publication of articles and books on the issue, and anti-bullying policies has been the measures most often used to address workplace bullying in Finland. For example, Salin (2008) found that the introduction of written anti-bullying policies and the provision of information were the most common measures adopted by organizations to counteract workplace bullying in Finland. Particularly the section on harassment in the “new” Occupational Safety and Health Act (1.1.2003) has activated organizations to develop and implement policies and guidelines for workplace bullying.

Safety and health inspectors discuss inappropriate behavior and harassment always when they are carrying out an inspection in a workplace. Inspectors ask if any cases have taken place in the organization, about the existence of policy and procedures for inappropriate behavior and bullying, and about training on harassment and inappropriate behavior. If there is no policy in place in the organization, the inspector advises the organization to draw up one. In inspections, a survey called “VALMERI” is used which includes also a question on harassment and inappropriate behavior.

In the Finnish Quality of Work Life Survey 2008, the measures taken to eliminate or prevent workplace bullying at the workplace the most commonly observed measures were: 1) good treatment or elimination of bullying had been taken into consideration in supervisory activity (45% of respondents), 2) prevention of bullying had been taken into account in occupational health and safety (39%), and 3) a set of rules for good treatment had been drawn up (33%) (Lehto & Sutela 2009).

In a survey among private, municipal and government organization in 2008, managers were asked if there had been need for reduction of psychological violence (bullying) or reduction of inappropriate behavior in their organization, and in case of need if something had been done. The need for reduction of both psychological violence (bullying) and inappropriate behavior was highest in the municipal sector where one out of three managers reported such need. Of private sector managers 20% and of government sector managers 25% reported such need. According to the managers, in almost all organizations also something had been done.

Current needs

In addition to the current needs in relation to active and immediate reaction to complaints of bullying, and skillful and impartial investigation of the situations, it is important to arrange proper rehabilitation opportunities for people with severe health effects and trauma because of bullying, also for those who are not working anymore and therefore do not have the opportunity to use occupational health care services. Although workplace bullying has been in the agenda in the Finnish working life for twenty years, the number of active researchers in the field is very limited. Therefore more researchers, and also practitioners, to work with organizations for the prevention and management of workplace bullying and harassment is needed.

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Workplace Bullying and Harassment in Sweden: Mobilizing against Bullying

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1. A general picture of Swedish society

Sweden, as a welfare state, was developed in the 1960s and 1970s. Its welfare system was then among the world foremost and included building of modern dwellings, low unemployment, and an improved health care system. In the 1980s and 1990s Swedish society took on a more individualistic form guided by the market economy. The welfare system has been undermined but is still well-developed, compared to other countries. Sweden also has a long tradition of strong trade unions, and negotiations between employers and unions have influenced working conditions for employees and have especially improved the physical work environment. Equality between women and men is among the highest in the world, but still there is a long way to go towards equal salaries for the equal work and equal influence in society. The country has opened its borders to streams of refugees from war-ravaged countries for humanitarian reasons and, because it needs the manpower of immigrants from Europe. Swedish unemployment is now about 8 percent, much of which is made up of adolescents and immigrants.

The average age life expectancy in Sweden is 83 years for women and 79 years for men. The rising age of the elderly population has increased the need for medical and social care. The health system tries to meet these demands and keep costs within a reasonable range by structural changes and advances in medical treatments. There is also a trend in society to promote a healthier lifestyle. Infant mortality rates are among the lowest in the world and deaths from heart disease in Sweden have decreased, showing how medical care and changes in lifestyle can result in healthier populations. However, mental ill-health has been increased in Sweden in recent years. The costs of sick leave are highest for psychological disturbances, and diseases of muscles and skeleton, and dementia are requiring more and more attention. Despite progressive social indicators, bullying continues to occur in the workplace.

2. Prevalence of bullying

2.1 Sweden

The reported prevalence rates of workplace bullying vary and can be explained by differences in study design, populations, and questions posed of bullying. In a representative sample of a working population in Sweden, between the ages of 15 and 74, 3.5% of those studied reported that they had been exposed to one or more unethical or hostile actions at least once a week for six months or longer (Leymann 1996). In a

multivariate analysis of 1,219 women and 1,409 men working for the Swedish postal service, 16% of the women reported knowledge of bullying in the workplace, and 8% of them had been bullied themselves (Voss et al. 2008).

Statistics Sweden conducts work environment surveys every other year at the direction of the Swedish Work Environment Authority. The purpose is to describe the work environment of the working population between the ages of 16 and 64. The 2011 survey was based on 12,400 telephone interviews and 7,800 answers to a postal questionnaire. It included one question about ever been exposed to bullying by managers and coworkers and one question about sexual harassment from managers and coworkers over the last 12 months. The results showed that midwives had the highest frequencies of bullying (13%) for work which required of them specialist competence. These results can be compared with university, college and high school teachers (9%), civil engineers (10%), and data specialists (5%). Midwives were also exposed to harassment based on sex in 9%, teachers and civil engineers in 11%, and data specialists in 5% of all cases. Nurses, who required fewer years of higher education were exposed to the same amount of bullying as midwives (9%), and engineers and technicians in 7%. In this group administrative assistants, inventory and transport assistants, and other office personnel were exposed to bullying in 12 % of all cases. Assistant and practical nurses were most exposed to bullying in the group of service, social care, and manual work (12%). Hotel and office cleaners among the group of those without special training were most exposed to bullying of all the groups (17%). When the incidence of bullying is analyzed by industry, the results show that 16% and 13% of those employed in private and cultural jobs, 12 % and 20% working in hotels and restaurants, and 10% and 9% of those in health and social care had at least sometimes been exposed to bullying and harassment based on sex in the last twelve months. Thus, the results indicate that employees in health and social care, assistants, hotel and restaurant personnel and cleaners make risk for bullying and harassment (Swedish Work Environment Authority 2012:4). It is a weakness of the study that bullying and harassment were only investigated through two questions, and the intensity of bullying was not measured.

In a Swedish intervention study baseline data was collected according to The Negative Acts Questionnaire (NAQ-R) (Einarsen & Raknes 1997, Einarsen et al. 2009), and by three self-labelled questions from 1,550 individuals employed at five hospitals and five municipalities in an ongoing Swedish intervention study (Step I, described below). The results showed that 18.5% were bullied based on the criterion of one negative act per week (Leymann 1996), 6.8% were bullied by two negative act per week (Mikkelsen & Einarsen 2001), and 4% experienced self-labelled bullying. Twenty-two percent had witnessed bullying and 38% had been bullied earlier in life (Rahm et al. 2012).

2.2 Other Scandinavian studies

Other Scandinavian studies have also shown a variation in the frequency of bullying. A comprehensive Norwegian study of 7,986 people found that about 8.6% of the employees in a variety of workplaces had been bullied over the past six months (Einarsen & Skogstad 1996). Older workers were bullied to a significantly higher degree than younger ones, with the exception of university employees over 50 years of age, who were significantly less bullied. Large, industrial workplaces dominated by men had a higher incidence of bullying than smaller workplaces. According to this study, bullying seemed to be more prevalent in private organizations than in the public sector. The assessment

instrument used was developed to increase validity by classifying bullying according to direction not bullied, limited criticism at work, limited negative clashes, bullied sometimes, work-related bullying, and the victim of bullying. In a later representative study Nielsen et al. (2009) showed that self-reported victimization have been decreased from 8.6% to 4.6% and from 4.6% to 2% for them who labelled themselves. A total of 14.3% was targets of bullying being exposed to at least one negative act per week during 6 months and 6.2% was classified as targets by using a stricter criterion of being exposed of two negative acts during 6 months. Another study compared the amount of harassment in the workplace among flight attendants, female nurses, and female elementary school teachers. More nurses (19 %) than flight attendants (12 %) were exposed to bullying, physical violence and threats in Iceland (Gunnarsdottir & Sveindottir 2006). In Denmark hospital staff members, were bullied in 16% of all cases were a person was exposed to one negative act a week or more, often, but only 2% using a more stringent criterion of two acts or more a week. A total of 15.6% had witnessed bullying at the hospital (Mikkelsen & Einarsen 2001). Finland seems to diverge from the other Nordic countries with a frequency of bullying of 5.3 (Kivimäki et al. 2000). However Sahlin (2001), using a slightly modified version of the NAQ found that 24.1% were bullied by at least one or more negative acts peer week.

2.3 Europe

According to research from other countries, hospital employees in England are also bullied. Quine (2001) found that 44% of all nurses and 35% of other health care staff had experienced one or more kinds of bullying over a 12-month period. Fifty percent of all nurses had also witnessed bullying by others. A total of 26.6% were bullied on Austrian hospital (Niedl 1996). In a large randomized representative study from the UK, where a total of 5,288 questionnaires based on the definition of Einarsen & Skogstad (1996) were returned (response rate 42%). 10.6% of the respondents reporting bullying within the last 6 months. However, bullying had increased to 24.7% within the last 5 years and 46.5% had witnessed bullying during the same time period. Notelaers et al. (2006) studied a sample of 6,175 respondents from 18 Belgian organizations. A total of 57% completed a Dutch and 43% a French questionnaire. The results showed that 3% bullied their victims, 8% engaged in work-related bullying, and 9% sometimes bullied others, according to a latent cluster analysis; 20.6% could be regarded as victims, and 79.4% non-victims, using an operational classification method. A summary of empirical studies with different definitions and means of assessment in Europe found that between 1% and 4% of employees may experience serious bullying, and between 8% and 10% occasional bullying (Zapf et al. 2003).

The above results indicate that bullying may be especially prevalent in some professional categories. Sweden has more bullying than Denmark and Norway in studies with equal design. The Nordic countries showed less bullying in comparison to some other countries. Bullying increases the longer the victims of bullying are exposed to negative acts such as individual and work related insults.

2.4 Gender perspective

Regarding gender Leymann (1996) found that 55% of all women and 45% of all men were being bullied in Sweden. He revealed that 76% of the men were being bullied by men, 3% were being bullied by women, and 21% were being bullied by both men and women.

By contrast 40% of the women were being bullied by women, 21% were being bullied by men, and 30% were being bullied by both men and women. Einarsen and Skogstad (1996) found in Norway that most bullies were men, but men and women were equally bullied. In another study (Einarsen & Raknes 1997), it was reported that colleagues and superiors exposed 7% of men to ridicule and intrusive harassment, verbal abuse, rumors, insults, hostility or silence when a conversation was initiated, or depreciation of an individual's work at least once a week, and 22% one or more times a month. In Finland Björkqvist (1994) argued that men were bullied by means of abrupt behavior which makes the victim feel excluded from the community, while women, who tend to have a more psychosocially-oriented intellect, could be bullied through social manipulation. Lee (2002) claimed that international research failed to problematize the gender perspective and decreased its importance to findings. Above example shows that both women and men become victims of prevailing power structures (Wamala & Lynch 2002), and femininity and masculinity that defy these had effects on the bullying. In summary, more women than men were bullied, men bullied women, women bullied men, but both men and women tended to bully their own gender.

3. The definition and process of bullying

Sweden has been a pioneer in research about bullying during the 1970s, 1980s and 1990s with the work of Olweus (1978, 1992, 1999) and Leyman (1990, 1992, 1996). Olweus studied bullying among schoolchildren and Leymann did the same for workplaces. Unfortunately, research into bullying at workplaces has stagnated since 2000. Leymann (1990, 1996) called bullying 'mobbing' or 'psychic terror' in which four critical elements can be discerned:

- 1) The original critical incident consisting of the observed conflict, which probably triggered the bullying in the first place.
- 2) 'Mobbing' and stigmatizing, including attacking someone's reputation, insulting communication, isolating, assigning meaningless work tasks, and violence, or threats of violence.
- 3) Conflict with personnel administration because management takes over the prejudices of the victim's coworkers.
- 4) Ultimate expulsion of the bullied victim from the workplace.

In summary, Leymann (1990) defined mobbing as 'hostile and unethical communication which is directed in a systematic way by one or a number of persons, mainly towards one individual. These actions often take place (almost every day) over a long period (at least for six months) and because of this frequency and duration, result in considerable psychic, psychosomatic and social misery' (1990). Such hostile and unethical activities repeated frequently over long periods of time can change the climate of the workplace and stigmatize the exposed individual. The bullying is legitimized when workplace management accepts and adopts prejudices concerning the stigmatized person. Bullying implies an imbalance in the power between the bullied victim and the bully. Bullying can take place when work groups choose to relieve their frustration at an unsatisfactory work situation on somebody, a scapegoat (Thylefors 1999). The equal status between two individuals is changed to a more hostile one in which the bully defines the conditions of the relationship (Fors 1993). In doing so, the bully utilizes her/his sphere of action at the bullied victim's expense as the bully's power is increased (Björck 1995). The

concepts of bullying and harassment are often used synonymously and might be seen as two aspects of the same thing. They can co-exist or one can dominate, but both damage the exposed individual as well as the organization in which they occur (Nazarko 2001).

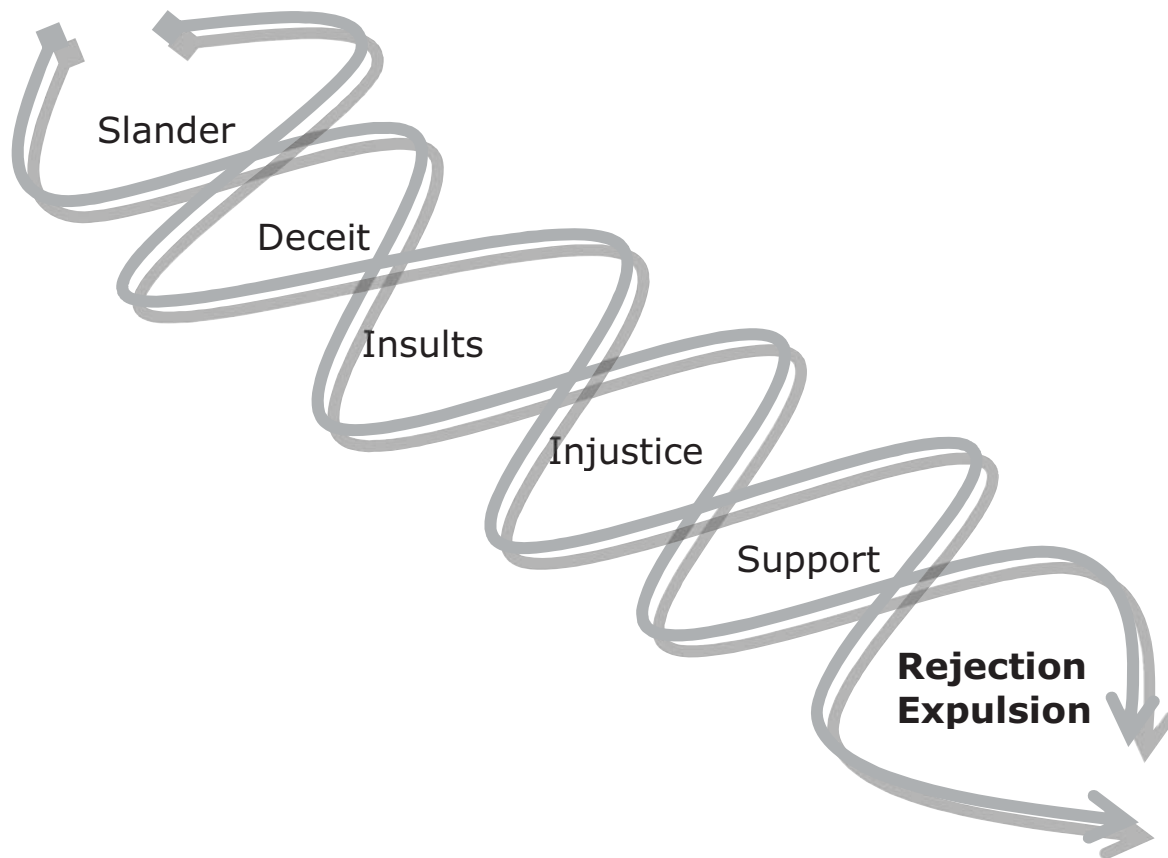
Leymann (1990) states that little has been written about the first critical incidents in bullying, the observed conflicts. However, Strandmark and Hallberg (2007a) described in a qualitative study how bullying starts when a struggle of power is transformed into bullying. Workplaces with restricted participation, weak and indistinct leadership, betrayed expectations, and poorly defined roles create a negative psychosocial environment. In such an environment, deep professional and personal value conflicts may arise adding to other daily cognitive and affective conflicts. Individuals who describe themselves as strong, competent, and driven, as well as others who consider themselves vulnerable and sensitive, perceived that they did not comply with the norms and values of their work groups and were regarded as threatening to their workmates. A struggle for power began when those involved failed to resolve their value conflicts. The fight was a battle to decide who was the strongest. If the conflict remained unresolved, the gap between the targeted person and their opponents widened. Although in some cases the problem faded away, it often developed into systematic and persistent bullying (Strandmark & Hallberg 2007a). The struggle of power may be illustrated by the following excerpt:

‘My knowledge gives me power and I don’t give in She has to keep me down at all cost Fundamentally, it’s a matter of power between her and me and in that respect I suppose we are quite similar.’

In an explorative and qualitative case study, Hedin et al. (2008) showed how the process of criticizing initiated bullying and resulted in consequences for whistle blowers. The interviewed workplace critics were recruited for interviews from administrative jobs, social care, non-profit work, health care, and the Swedish church. The findings showed that critiques were often grounded in reorganization, improper or unethical work methods, lack of professional morale, attempt to conceal information, discrimination and insults, and lack of supervision, and negative work environments. Insults, often occurred between a supervisor and a sub-ordinate, but could also take place among coworkers. Criticism may pass from internal critique to external if it is received by silence, passivity, nonchalance on the part of management, or if the process is cut off. More than half of the interviewees revealed that reprisals had been taken place as a result of the critique. The critics’ validity and legitimacy are challenged, diminishing their status and position in the organization. The usual consequences of criticism were that the critics were reassigned to other positions or were given notice of dismissal. Nevertheless, critiques have also led to improvements, such as reorganization, changed work methods or restructuring routines, education of personnel, or changed allocation of resources.

Comparatively to Leymann’s research (1990, 1996), the process of bullying can be described as developing through slander, deceit, insults, injustice, or special treatment. Its purpose is to alienate the bullied individual from the community at work, and finally from the workplace itself. Bullying appears to be to an attempt solve problems at the workplace, but these continue in other forms and involve other people after the bullied individual has been expelled. However, the bullied individual does not only experience betrayal and harassment, but also receive support from other individuals and groups in the surrounding environment, which temporarily alleviates the psychological strain. Nevertheless, this support cannot prevent the continuing process of bullying (Strandmark & Hallberg 2007b) (see Figure 1).

Figure 1: A conceptual model showing the process of rejection and expulsion from the workplace (Strandmark & Hallberg 2007b)



4. Health consequences of workplace bullying

Hallberg & Strandmark (2006) explored the health consequences of workplace bullying with help of a core category labelled that they remaining marked for life. By this meant that adult bullying is perceived by its victims as a severe psychological trauma or a traumatic life event. The core category contained five additional categories; 1) feeling guilt, shame and diminishing self-esteem, 2) developing symptoms and reactions, 3) getting limited space for action, 4) working through the course of events, and 5) trying to obtain redress. Bullying included the spreading of rumours and repeated insults aimed at changing the image of the bullied person negatively, resulting in 'feelings of guilt, shame and diminishing self-esteem' in the exposed person. Physical and psychosomatic symptoms gradually emerged ('developing symptoms and reactions') and medical treatment and sick-listing often follow. The longer the bullying continued, the more limited became the possibility to change the situation ('getting limited space for action'), such as changing the workplace. Returning to a 'normal' life might be possible, but presupposed the process of 'working through the course of events' related to the bullying. This process was often painful, as events from bullying are re-lived over and over again, both in dreams and when awake. The bullied person was also 'trying to obtain redress' through such means as monetary compensation, professional confirmation, or by gaining a new meaning in life.

Despite this, bullying left an internal scar or vulnerability they never entirely heal; the bullied person 'remains marked for life.' The following excerpt from the interviews illustrates the core category:

'No, I will never forget the bullying, never ever. There is still a large scar left inside me. I always have to carry this scar with me . . . and I have never managed to understand the bullies, either. That was an episode that now has passed away and now I have to continue living my life. But I think it would have been much easier to live my life without this scar inside. . . that is what I think . . . definitely. When I, for example, read in the paper about someone being bullied somewhere, the old scar reopens and it hurts. In some way I must try to repress it all the time . . . if it is possible.'

Bullying included a sort of life crisis, which was the case for some of the informants in the present study. Contrary to other life crises, bullying was most often perceived by these informants as a purely negative event, rather than as an event that also provided personal development and strength or other positive gains.

'I do not know if there is anything positive about this . . . The bullying might have given me a somewhat increased understanding of other people. But personally I do not think of it as anything positive. It has been said that you often get strengthened through a life crisis but I am very doubtful of that statement. No, I think it has solely been negative for me.'

Bullying can also be perceived as destroying or 'cracking' the health, career, and personality of an exposed person. An informant in the study, a female teacher in her forties who was bullied by her manager, gave an example of this way of thinking:

'The bully has actually cracked my health. She has also cracked my professional career . . . and my personality as well . . . Everything that earlier was me, that is no longer me.'

When, bullies blamed the bullied person for the problems at the workplace, and the bullied individual accepted this responsibility by feeling guilt and shame, the bullied person's self-esteem decreased and she/he was ashamed at not being worth more than a person to be bullied. Psychosomatic symptoms and emotional reactions emerged. As the process of bullying continued, the bullied person's choices became increasingly limited, since she/he did not have strength enough to change the situation. However, there was a way back to a normal life through working through the emotional processing of the bullying, redress and a new meaning on life. Redress was based on proof that the bullying was wrong and unjust. However, in spite of redress, the bullied person never forgot the bullying, but was scarred for life by it (Hallberg & Strandmark 2006).

Studies in Scandinavia and elsewhere have also shown a connection between bullying and ill-health in the form of psychosomatic symptoms and mental distress (Leymann 1992, Mikkelsen & Einarsen 2002a). Bullied individuals reported more annoyance, distress, depression, worry, aggression, and persecution mania compared to other workers (Björkquist et al. 1994, O'Moore et al. 1998). Post-traumatic stress syndrome (PTSD) was also identified in the victims of bullying (Björkquist et al. 1994, Leymann & Gustafsson 1996, Mikkelsen & Einarsen 2002a). When these interacted with the sense of coherence (SOC), the stress symptoms decreased at a lower degree of bullying, but were not weakened in serious cases of bullying (Nielsen et al. 2008). For instance, in the Swedish postal system bullying was associated with a double risk of high incidence of illness (illness in itself, as well as the experience and diagnosing of illness). This indicated that

bullying marked a social climate that brought about sick-leave (Voss et al. 2008). Bullied individuals had more general and mental stress reactions and feelings of low self-esteem than those who observed bullying (Quine 2001). However, the observers in turn experienced more general and mental stress reactions than those who had not witnessed any bullying. Vartia (2001) pointed out that everyone involved in the process of bullying in the workplace is negatively affected. Generalized self-efficacy seemed to work as a moderator between the exposure of bullying and mental health problems (Mikkelsen & Einarsen 2002b).

5. National legal regulation and its effects

The Swedish Work Environment Act (SFS: 2008) states the grounds for a good work environment. The purpose of this act is to prevent ill-health and accidents at work and generally promote a positive atmosphere environment. The law says that work circumstances shall be adjusted to human beings' different prerequisites taking into account physical and psychological considerations. It should strive to enable variation, social contact, and collaboration, and connection between individual work tasks. Another basic law that opposes bullying is the Criminal Code (SFS 1962:700), including avoidance of powerlessness, abuse of one's exposed disposition, and insulting behavior.

Sweden published its first legal regulation (AFS 1993:17) targeting workplace bullying already in the early 1990s. It is entitled Victimization at Work. The ordinance consists of six paragraphs under three main headings: Scope and Definitions, General Provisions, and Routines. The first section applies to all activities in which employees can be subjected to victimization. By victimization is meant recurrent reprehensible or distinctly negative actions that are directed against individual employees in an offensive manner and can result in those employees being placed outside the workplace community. The second section states that an employer should plan and organize work so as to prevent victimization as far as possible and shall make clear that victimization is not acceptable in the workplace. Routines to detect early signals, work with problems, and follow up on interventions is emphasized in the third section. Further, employees who have been exposed to victimization shall be provided with rapid help or support. Notably, the regulation does not use the word bullying, except in the guidelines to the paragraphs in which they describe phenomena that in daily speech are called adult bullying, mental violence, social rejection, and harassment, including sexual harassment. These phenomena have increasingly appeared as particular problems in employment and are intended to sum up victimization (*kränkande särbehandling* in Swedish). The guidelines also emphasize designing routines, that guarantee the psychological and social work environment circumstances, and include assuring that personal behavior, the work situation, and the work structure will be as good as possible. Further, they encourage creating a kindly and respectful work climate, provide for educating supervisors, and foster mutual dialogue, collaboration, objective, and positive problem-solving attitudes, and gave support to a quick readjustment and return to work.

Hoel and Einarsen (2010) have evaluated the effect of the ordinance Victimization at Work by semi-structured interviews with 18 stakeholders from employer and trade unions, enforcements authorities, academia, and victims support organizations. They conclude that the legislation has been far from successful. Their findings show that the ordinance has shortcomings related to the vagueness of its regulations, difficulties in engaging employers

control and in managing attitudes and human relationships, problems with the Labour Inspectorate, and lack of progress in getting responses from the trade unions. They argued to the prevailing Swedish culture appears to sanction tacit bullying and the right to exclude somebody from the workplace. In order to succeed anti-bullying legalization requires well-informed, trained, and motivated employers as well as trade unions, that are willing to collaborate in addressing problems on an organizational and an individual level. Self-help activities and bystander interventions also have their place in the attempt to solve bullying problems. The legislation must be supported by an enforcement agency that has competence to carry out this.

Sweden has also a law against discrimination (SFS 2008:567) on the basis of sex, ethnicity, religion, handicap, sexual orientation, or and age. This law can be invoked, when bullying is part of above areas of discrimination.

6. Example from a Swedish intervention study in health and social care

An intervention study is ongoing in collaboration with the Public Health Sciences and Nursing at Karlstad University in Sweden. The research group consists of Margaretha Strandmark K., Gun Nordström, Bodil Wilde-Larsen, GullBritt Rahm, and Ingrid Rystedt.

The overall aims of the study are as follows:

- to examine the prevalence of bullying and study the possible relationships between bullying and the psychosocial work environment within the health and social care system (Step I)
- to explore workplace strategies and routines to prevent and manage bullying (Step II)
- to develop and implement a program for action in order to prevent and eliminate bullying in collaboration with workplaces (Step III)
- to evaluate the implementation and the results of the intervention program (Step IV)

6.1 Step I

Questionnaires including the Negative Acts Questionnaire (NAQ-R) (Einarsen & Raknes 1997, Einarsen et al. 2009); a short form of the General Nordic Questionnaire for Psychological and Social Factors at Work (QPSNordic 34) (Lindström et al. 2000); the Sense of Coherence (SOC) (Antonovsky 1987, 1996); Health Index (Nordström et al. 1992); and the General Health Questionnaire (GHQ-12) (Sconfienza 1998, Banks et al. 1980) were administered to a total of 2,810 employees. Some were providing mostly medical services at five hospitals, and others cared for elderly people in five municipalities. The response rate was 55% (n = 1,550). Background variables, one question about perceived bullying, one question about witnessing bullying, and one question about being bullied earlier in life were added to the instruments. The results of the analysis thus far are described above under 'Prevalence of bullying in Sweden.'

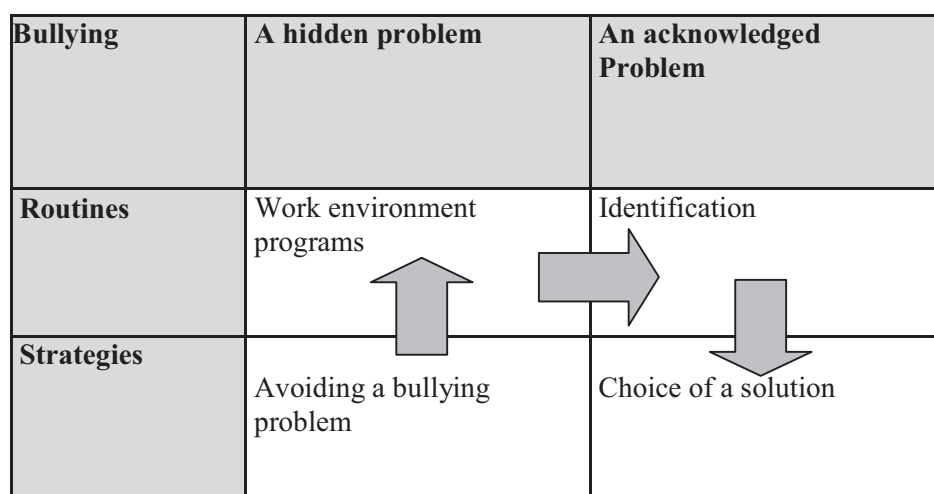
6.2 Step II

Twelve key individuals selected from one hospital and two municipalities in which bullying exists, according to responses on the questionnaire, were interviewed in-depth.

The sample consisted of upper level managers, a human resources officer, staff responsible for the work environment, union representatives, and occupational health workers. The interviews were audio-taped, transcribed verbatim, and analyzed by content analyses according to Graneheim & Lundman (2004).

Two themes emerged in the findings bullying as a *hidden* problem and bullying as an *acknowledged* phenomenon. In Figure 2 the categories ‘avoiding a bullying problem’ and ‘preventive work environment programs’ connected with the theme of bullying as a hidden problem as well as the aims of strategies and routines. The ‘identification of the bullying problem’ and ‘the choice of a solution’ were related to the theme of bullying as an acknowledged phenomenon as well as the aims of routines and strategies.

Figure 2: Bullying as a hidden and an acknowledged problem (Strandmark et al. 2012)



Bullying as a hidden problem meant that the management and the other involved ‘sweep the problem under the carpet’. They hesitated to use the word of bullying and the preventative measures did not directly deal with bullying. The personnel department and representatives from the union and occupational health failed to recognize the problem since they were not given any indication that bullying was going on. Therefore, they could not help ward supervisor solve the problem. As one management supervisor said:

‘It becomes a problem for the ward supervisor because they can’t imagine that it occurred.’

Firstly, when the fact had been pointed out the bullying was acknowledged the problem identified, and the search for a solution began. The routines had not been instituted at the workplace and were realized ‘ad hoc’ spontaneously from the situation that arose. One of the resource persons gave an example of developed bullying:

‘Someone had written ‘You shall only disappear’, on a slip of paper.’

The bullying problem was often solved by breaking up a group and moving the persons involved to other wards. Sometimes they also worked through the bullying process in the group to heal the involved (Strandmark et al. 2012).

6.3 Step III

In this step the research approach was participatory and community-based. Based on the answers to the questionnaires targeting bullying workplaces with the highest average, quartiles, and points (33 and 45) (Notelaers & Einarsen 2012) were invited to participate with upper-level of the hospital upper-level supervisors and upper-level managers at the municipalities. The grade of the bullying problem was assigned a range of colors; red, orange, yellow, and green. One psychiatric ward for older adults and two nursing homes for the elderly in two municipalities took part. Six to ten persons volunteered to participate within the focus groups at three workplaces on three occasions. One person from the research group was an observer and one was a moderator. The interviews were audio-taped and transcribed verbatim. The discussions issued from an interview guide with themes and open questions about good work environments and bullying. The first focus group discussed how the bullying problem had been expressed. The ward supervisor did not participate in this group so that the coworkers might feel more comfortable in relating their experiences. Later the three ward supervisors involved were interviewed individually to supplement the information gathered. The second focus group discussed what the intervention should contain. Finally, the third focus group took up a suggestion for the intervention program. A fourth focus group will consider on how the intervention was implemented in the respective workplaces. The interviews were analyzed according to grounded theory methodology (Charmaz 2006), consisting of initial coding, focused coding, and memos.

The preliminary findings revealed a bullying problem in which the ward supervisor played a key role as the spider in a web. In her interactions with staff and management she was in an intermediary position, because she was expected to be loyal upwards as well as downwards in the organization. The hierarchic organization, even on the level just over the ward supervisor, seemed foreign to the staff who reported having no knowledge of what was happening upwards in the organization. They perceived management on upper level as unfair in regard to planning, actions and distribution of resources. Those involved told that the essential elements of a foundation for zero-tolerance against bullying included; humanistic values, awareness of the bullying problems, an open atmosphere, good collaboration within and between groups, and conflict resolutions (Rahm et al. 2012). A responsible manager summed it up:

‘It’s not without reason we are called hamburgers at this level We have to press from beneath and from above with many layers of ‘dressing’ that drips out when there are too many demands on us.’

Intervention program

Based on the findings reported an intervention program was developed together with the employees. It consisted of half a day lectures for all employees about bullying as a phenomenon, shame, communication, and managing conflicts. Group discussions were prompted by a card game called ‘Mobilizing against bullying,’ which described examples of potential bullying situations. Finally, a concrete action plan was developed. The group also defined how this plan should be implemented and evaluated.

The participants could choose among playing a role game, reading a chapter of a book about taking measures against bullying and presenting a reflection of that in a workshop, and play card games. All the workplaces chose the card game, whose aim was to reflect on

the process of bullying. The following example of a bullying situation is taken from one of the playing cards:

Situation: You see a coworker far down in the corridor. Suddenly, the person changes direction and takes the stairs down without greeting you.

How do you react?

- a) Ask the person if she/he did not see you.
- b) Be sorry and say nothing.
- c) Complain about the person to your other coworkers.
- d) Other?

One participant took a card, read the situation and began to reflect to the first alternative. Thereafter she/he passed the question to the other participants and discussions arose within the group. When this alternative was exhausted the participants passed on to the next alternative. In this way, all the questions are discussed in sequence.

The developed concrete plan of action comprised a system of values, to recognize bullying and become alarmed, behavior as creating safety and confidence, managing conflicts, the ward supervisor's and coworkers' roles, dynamic group processes, and meeting places to keep the discussion alive. The plan also was presented and discussed in steering groups with upper-level managers. It will be followed-up by having all employees sign it. New employees shall be assigned a mentor. The responsible manager shall be responsible for the plan's success, and the participants of the focus groups shall keep the discussion about bullying alive.

6.4 Step IV

This step will consist of an evaluation of a) the wards that have taken part in the intervention, and b) a control group with current bullying problems that has not participated in the intervention. This part of the study is scheduled to take place in 2013.

7. The role of voluntary organizations in eliminating workplace bullying

There are several voluntary organizations in Sweden for eliminating bullying, including STOP, OMM and Friends (schoolchildren). One of the most active is OMM, which means Organization Against Bullying (*Organisation mot mobbning*). It is a political and religiously unaffiliated and works to identify, map, and eliminate bullying in employments. It informs and supports individual members, makes demands on authorities concerning questions of bullying, and promotes improved legislation against bullying in the workplace. It makes sure that the Social Insurance Office investigates all received reports of victimization, and advertises its mission in the media. The organization works with workshops, installations, demonstrations, public announcement, and lobbying politicians. They have vigorously pushed for legislation to assist victims of bullying authority (OMM).

Recently, another initiative to eliminate bullying has appeared on a website called Step by Step. It is the first Swedish organization to address bullying, wherever it occurs. Step by Step is dedicated to achieving healthy psychosocial work environment through education and by changing attitudes towards victimization and bullying (Step by step).

The employee trade union Vision, which is a part of the Swedish Central Organization of Salaried Employees (TCO) has suggested legislation called a Law to Forbid Workplace Harassment in the working life. It seeks to promote tolerance and improve working conditions (Vision 2012). A political party on the left has submitted a motion for a law against bullying.

8. Conclusion

The results presented show that especially vulnerable as well as strong and competent people have experienced bullying, which means that all of us can be exposed to bullying. It often starts with a struggle for power and is transformed to bullying when one of the parties is placed in a weak position against the other one. The aim of the bullying process is first to exclude the victim from social contact with coworkers and then expel the victim from the workplace entirely. Bullying causes a great suffering that may last a lifetime. The magnitude of its impact makes it urgent to mobilize all forces to prevent and eliminate bullying.

Those in upper-level of management often hesitate to acknowledge that there is bullying within their workplaces. Nevertheless, considerable efforts have been made to improve the work environment at the middle level of organizations, and this may indirectly prevent bullying. Unfortunately, these policies and plans may not reach the lowest level of those organizations. In that way no preventative action descends to the workplace. The most common solution of the bullying problem is to split the group, put the bullied victim into another position within the organization, or give notice of dismissal. However, the risk is great that bullying will arise at other workplaces to which the person has been moved, as well as resume at the old workplace. In that situation, there is a need to implement a healing process for all involved. Supervisors play a crucial role in preventing and eliminating bullying in collaboration with employees and management. They must apply humanistic values, be aware of bullying, cultivate an open atmosphere, encourage group cooperation, and institute conflict solving to instill zero tolerance against bullying.

Bullying problems can only be solved by combining a top down as well as a bottom up approach. Existing Swedish legislation (top down) is still not enough to prevent and curb bullying, and protect its victims. Those regulations need to be complemented by concrete measures in order to resolve the bullying problem, including sanctions in the form of fines and compensation to the victims of bullying.

The ongoing intervention study presented is an example of a bottom up approach tied to intervention, in which capacity building and participation are emphasized. The thought driving it is to increase participants' understanding of the complex phenomenon of bullying and thereby lead to effective solutions to the problem. If employees themselves participate, there will be increased motivation to follow the plan of action and contribute to the prevention and elimination of bullying. Other important actors in a bottom-up approach to prevent and eliminate bullying are the bully victims, the voluntary organizations, and the trade unions. They can change attitudes toward bullying with their experiences.

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Workplace Bullying and Harassment in France and Few Comparisons with Belgium: a Legal Perspective

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I. Introduction

European framework-directive 89/391/EEC of 12 June 1989 concerning the implementation of measures aimed at promoting improvements in the health and safety of workers in the workplace marks a decisive turning point in improving health and safety at work. It guarantees minimum health and safety conditions throughout Europe, while authorising the member states to maintain or introduce stricter measures. The framework-directive certainly includes innovative provisions to oblige employers to take adequate steps to make work healthier and safer.

The framework-directive imposes a general obligation on employers to ensure their employees' safety. It introduces the principle of occupational risk assessments and encourages primary prevention, with the aim of preventing occupational risks as early as possible. The directive advocates imposing a "general obligation of prevention" on employers. Prevention is applicable to all risks, not only those on a necessarily restrictive list ("special obligation"). Furthermore, the framework-directive is intended to protect workers' "health", making no distinction between "physical health" and "mental health" in terms of occupational risk prevention, even if it is well-known that labour law practice emphasises the prevention of physical health hazards at work. The objective is to promote a "prevention culture". When the framework-directive dated 12 June 1989 was transposed into French law, it broadened the safety obligation beyond its previously restrictive interpretation. Indeed, the transposition law of 31 December 1991¹ stipulated that "law on health and safety" was based on "a general obligation of prevention imposed on employers, risk assessment, and training for workers and employee representatives"².

When the new legal provisions were introduced to combat moral harassment at work, the safety obligation took a new direction under the social modernisation law of 17 January 2002³, which introduced the concept of "physical and mental health"⁴ in the French Labour Code.

Although the phenomenon had always existed, "moral harassment at work" only really started to be considered in France in 1998, when the psychiatrist Marie-France Hirigoyen

¹ Law n° 91-1414 of 31 December 1991, *JORF* of 6 and 7 January 1992, p. 319.

² P. Chaumette, preface to L. Lerouge's thesis, *La reconnaissance d'un droit à la protection de la santé mentale au travail*, 2005, LGDJ, Coll. Bibliothèque de droit social, tome 40, 428 p.

³ Law n° 2002-73 on social modernisation of 17 January 2002, *JORF* of 18 January 2002, p. 1 008.

⁴ Initially intended to combat moral harassment, the system in its ultimate form exceeded its intended object.

published a book on this issue⁵. The author insisted: “It is possible to destroy a person with words, looks, and innuendos alone”⁶. She defined moral harassment in the workplace as “any abusive conduct, in particular behaviour, words, actions, gestures, and writing capable of violating the personality, dignity, or physical or psychological integrity of a person, jeopardising their employment, or deteriorating the working atmosphere”.⁷ Harassment may involve a manager and subordinate, or workers on the same level. However, the term “moral harassment” must be applied very carefully to avoid the risk of confusing this phenomenon with normal work-related stress or attempts to destabilise the manager of a company.

The influence of this book on French companies was immense and it raised awareness of this issue in the work world. Mare-France Hirigoyen’s book expressed in words the experiences of many workers that had not previously been recognised. Psychological pressure and insidious, perverse tactics that make it impossible to maintain a working relationship have, nevertheless, always been part of corporate life, as well as legal practice. Consequently, case law had recognised this phenomenon before 1998, even if different terms were used at the time. For example, in 1993, the Court of Cassation Chamber for Social and Labour Matters handed down a ruling that categorised an employer’s behaviour towards an employee as “insidious harassment”⁸.

Ms Hirigoyen’s book triggered a new collective awareness of the phenomenon of moral harassment at work. Associations for combatting moral harassment were founded and “moral harassment at work” became an issue in public debate. Two specific draft laws were submitted by French Member of Parliament Georges Hage in 1999 and Senator Roland Muzeau in 2001⁹. In 2001, the French Economic and Social Council (Conseil économique et social - CES)¹⁰ was also asked by the government at the time¹¹ to produce a report on this issue in the context of a draft law on social modernisation. It defined moral harassment as “all repeated actions aimed at degrading the human, relational, or material working conditions of one or more victims, in such a way as to compromise their rights and dignity, potentially having a serious impact on their health and jeopardising their career prospects”¹².

According to the 5th survey on working conditions, conducted by the Dublin foundation in 2010¹³, nearly 19 % of French workers had been victims of physical violence, intimidation, and moral or sexual harassment during the previous year. The average score in the 27 member states on this question was 14 %, ranging from 21 % in Finland or even 22 % in Australia to 8 % in Italy and even 7 % in Cyprus. Allowance should, however, be made for the fact that workers who are more aware of the phenomenon of moral

⁵ M.-F. Hirigoyen, *Le harcèlement moral, la violence perverse au quotidien*, Éditions La Découverte et Syros, Coll. Pocket, 1998, 252 p.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ Cass. soc. 16 December 1993, n° 4176 D Baudelocque c/ Malnar.

⁹ The French Parliament consists of 2 chambers (bicameral system): the National Assembly (lower chamber) and the Senate (upper chamber).

¹⁰ It is now the Conseil économique, social et environnemental (CESE – Economic, social, and environmental council), <http://www.lecese.fr/>.

¹¹ “Jospin government”.

¹² Economic and social council, *Moral harassment at work*, Paris, 29 March 2001, reported by Michel Debout, 124 p. <http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/064000130/0000.pdf>.

¹³ <http://www.eurofound.europa.eu/pubdocs/2011/82/en/1/EF1182EN.pdf>.

harassment at work tend to give more positive answers to questions concerning their exposure.

Nevertheless, the extent of public debate and discussions surrounding definitions¹⁴ has obliged legislators to take moral harassment at work into consideration. For example, a legal regime specific to harassment at work was developed in the French system, backed up by case law where interpretation by the courts improved the legal system enacted by legislators.

II. A specific legal regime for moral harassment at work in France and Belgium since 2002

France and Belgium have both developed specific legal regimes for moral harassment. However, besides a legal definition, a comprehensive legal arsenal is available to deal with moral harassment in France (A), whereas the Belgian legal system is less specific (B).

A. A legal definition backed by specific tools in France

The social modernisation law enacted on 17 January 2002 represented a fundamental step towards developing a legal framework for combatting moral harassment at work. This law marked the legislators' new awareness of occupational risks, particularly their consideration of the phenomenon of moral harassment at work and its legal recognition. Indeed, the social modernisation law developed a legal regime based on the introduction into the French Labour Code, Criminal Code, and Civil Service regulations of a legal definition (1), accompanied by specific provisions for combating this phenomenon (2), as well as immunity from dismissal for employees who report that they are harassment victims (3).

1. The legal definition of moral harassment at work

According to article L. 1152-1 of the French Labour Code "Employees should not be subjected to repeated actions constituting moral harassment, which intentionally or unintentionally deteriorate their working conditions and are likely to violate their rights and dignity, impair their physical or mental health, or jeopardise their professional future". An analysis of this provision shows that a situation must meet a certain number of conditions to be qualified as moral harassment at work. Firstly, the litigious acts must be "repeated". Secondly, these practices must be aimed at violating the victim's "rights" and "dignity". Finally, the third condition necessary to meet the definition of moral harassment is divided into three distinct parts: impairment to physical or mental health, or jeopardising the victim's career. The last three factors need not be combined, but one of them must be proven in combination with the first two conditions to meet the definition of moral harassment.

An identical definition was inserted in article 222-33-2 of the Criminal Code. This definition is, however, broader, as it is applicable to "moral harassment" in general and not only at work. However, the courts have considered that this definition should be restricted

¹⁴ Besides the definitions in the draft laws of 1999 and 2001, those given by Marie-France Hirigoyen and the Economic and social council, other definitions were proposed at various stages in the discussions: Christophe Dejourn, Michèle Drida, in particular.

to the workplace to avoid excessively widespread application. The vagueness of the text, which is also open to interpretation in terms of the actions likely to constitute the offense of moral harassment, thus gives unusual latitude to the criminal courts' powers of appreciation. However, case law from the Criminal chamber of the Court of Cassation has given full application to the law, while restricting it to the situations for which it was intended¹⁵. Case law also shows that the courts refused to apply the text to behaviour that could be construed as a normal exercise of the employer's management authority¹⁶.

When the law on sexual harassment, dated 6 August 2012, was enacted¹⁷, the maximum criminal penalty for moral harassment was raised from a 15,000 euro fine and one year's imprisonment to 30,000 euros and two years' imprisonment¹⁸. Civil service law was also amended with the same legal definition as the French Labour Code and Criminal Code. Article 6, paragraph 5 was introduced in the law of 13 July 1983¹⁹, specifying the rights and obligations of civil servants, but the legal criteria were not completely identical, particularly on the issue of qualification and the burden of proof²⁰.

Finally, since 2002, following several cases for failure to comply brought by the European Commission, French law was obliged to apply several European directives that had only been partially transposed into national law, particularly in the area of discrimination²¹. The law dated 27 May 2008²² included several provisions adopting European legal principles on combatting racial discrimination and extended the scope of "discrimination" by implementing the European definition of this concept. Discrimination now includes "harassment" (sexual and moral). According to article 1 (modified by the law of 6 August 2006 on sexual harassment), discrimination includes: "Any action related to one of the grounds mentioned in the first paragraph²³ and any actions with a sexual connotation, suffered by a person, with the purpose or effect of violating the person's

¹⁵ A. Coche, "Les conséquences pour les victimes des efforts jurisprudentiels destinés à compenser l'imprécision de l'incrimination de harcèlement moral", *op. cit.*

¹⁶ Cass. crim. 9 October 2007 n° 06-89.093, a civil servant was ruled not to have suffered moral harassment, although he committed suicide following years of severe criticism, as the criticism was justified.

¹⁷ Law n° 2012-954 of 6 August 2012 on sexual harassment, *JORF* of 7 August 2012 p. 12921.

¹⁸ The purpose of the article was to develop knowledge of the legal regime of moral harassment in private labour law. For more details concerning moral harassment and civil service law and its differences with the law applicable to the private sector, V. L. Lerouge, "Harcèlement : nouvelles dispositions issues de la loi du 6 août 2012", *Droit Social*, October 2012, p. 944-945.

¹⁹ Law n° 83-634 of 13 July 1983 on the rights and obligations of civil servants, *JORF* of 14 July 1983, p. 2174.

²⁰ V. L. Lerouge, "Les différences de traitement juridique du harcèlement moral dans le secteur privé et la fonction publique : des rapprochements possibles ?", *Droit social*, May 2012, p. 483-490.

²¹ Council Directive 2000/43/EC dated 29 June 2000 relative to the implementation of the principle of equal treatment of all persons without distinction of race or ethnic origin; Council Directive 2000/78/EC dated 27 November 2000, creating a general framework for equal treatment in employment and occupation; European Parliament and Council Directive 2002/73/EC, dated 5 July 2006, concerning the implementation of the principle of equal opportunities and equal treatment for men and women in access to employment, training, and career development, and working conditions; European Council Directive 2004/113/EC, dated 13 December 2004, on the implementation of the principle of equal treatment of men and women in matters of access to goods and services and supply of goods and services; European Parliament and Council Directive 2006/54/EC, dated 5 July 2006, on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

The Commission made a number of grievances against France, alleging that its law did not adequately reflect faithfully these Directives. In 2008, France was under investigation for late implementation of Directive 2006/54/EC.

²² Law n° 2008-496 of 27 May 2008 including several provisions adapting to European law on combatting discrimination, *JORF* of 28 May 2008, p. 8801.

²³ "A situation of direct discrimination is one where a person is treated less favourably than another person is, has been, or will be in a comparable situation, on the basis of his/her belonging or not, in fact or supposition, to an ethnic group, race, or religion, or on the grounds of his/her beliefs, age, handicaps, sexual orientation or identity or sex".

dignity and creating an intimidating, hostile, degrading, humiliating, or offensive environment”.

However, this new definition did not result in the abrogation of the previous definition. The grounds for invoking one or other of these definitions were, nevertheless, different. Indeed, the 2002 definition is based on repeated actions, whereas the 2008 law provides a legal remedy for discriminatory actions, which are not necessarily repeated.

French legislators have also issued a set of specific legal provisions to enhance the effectiveness of prevention of moral harassment at work in the private sector.

2. Legal provisions devised to combat moral harassment at work

Several provisions in the French Labour Code were modified to clarify and support the definition of moral harassment: (a) the burden of proof; (b) the employer’s general obligation of prevention; (c) performance of the employment contract in good faith; (d) the powers of the Committee on health, safety, and working conditions (CHSWC) and the occupational health service; (e) the immunity of people reporting moral harassment incidents; (f) mediation; and (g) the role of worker representatives, as well as trade unions.

a. The burden of proof of moral harassment: a modified system

The burden of proof of moral harassment at work was modified, similarly to the system applicable in cases of discrimination²⁴. Under article 1154-1 of the French Labour Code, when a dispute meets the definition of moral harassment at work, “any applicant for employment, work experience, or on-the-job training, or employee is responsible for establishing the facts that support the presumption of harassment”.

It is then up to the defendant to prove that the actions that led to the complaint did not constitute harassment and that the decision was justified by: “objective elements that had nothing to do with harassment”. The judge then forms his/her own opinion and may order any steps to investigate the situation that s/he deems useful for reaching a decision. Finally, article 1154-1 of the French Labour Code authorises representative trade unions in the enterprise to take any legal action on behalf of an employee who feels that s/he has been a victim of moral harassment, subject to obtaining the written consent of the person concerned. The victim may stop the legal proceedings launched by the trade union at any time.

b. The extension of the employer’s general obligation of prevention to “physical and mental” health

The legislator also insisted that the employer’s obligation of prevention under article L. 4121-1, consisting of implementing the necessary measures to ensure workers’ safety and protect their health, was extended to include “physical and mental health”. Indeed, since 2002, employers have been under an obligation to prevent impairment to workers’ mental health and risks linked to moral harassment. This goes beyond provisions for combatting moral harassment to lay the foundations for the recognition of mental health in labour law. It is independent and may also form the basis of specific actions to ensure compliance or

²⁴ This is not the case in criminal law, where criminal procedure is applicable and the entire burden of proof is borne by the prosecution, or in civil service law, even if the Council of State has started to align its case law on the same requirement of proof applicable to discrimination cases.

apply penalties for failure to meet the employer's obligation of prevention in relation to workers' mental health²⁵.

The social modernisation law also modified the contents of the personnel regulations policy, which expresses the regulatory power of the employer. Under the law dated 4 August 1982 on workers' freedom in the enterprise²⁶, in addition to implementing the provisions of the French Labour Code, employers must issue norms on prevention via the personnel regulations policy and apply them to employees. This means that employers are obliged to include the requisite measures in the personnel regulations policy to ensure the application of health and safety legislation. The social modernisation law imposes the obligation on employers to implement measures: "to prohibit all moral harassment practices". The personnel regulations policy may only be issued following consultation with not only the works council or, in its absence, the workers' representatives, but also the committee on health, safety, and working conditions, i.e. the competent body for matters concerning physical and mental health at work. The imperative effect of this legislation means that employers are bound by their own rules, so the courts may treat the personnel regulations policy as an applicable source of law in disputes concerning moral harassment at work²⁷.

Article L. 4121-2 of the French Labour Code stipulates that employers must prepare a consistent prevention plan, integrating technical aspects, work organisation, working conditions, industrial relations, and the influence of ambient factors, particularly risks relating to moral harassment. This obligation is reinforced by article L. 1152-4 of the French Labour Code, specifying that employers must take all necessary steps to prevent moral harassment. The law dated 6 August 2012²⁸ stipulated that employers must also display in the workplace article 222-33-2 of the Criminal Code concerning the criminal offence of moral harassment. Furthermore, employment contract terminations are null and void in cases where there is a lack of knowledge of the definition of moral harassment at work or when an employee who lodges a harassment complaint benefits from immunity. Finally, the employer does not bear sole liability. Indeed, an employee responsible for actions constituting moral harassment is liable to disciplinary action.

Even if it was not introduced by the law dated 17 January 2002, the single occupational risk assessment created by the decree dated 5 November 2001²⁹ is likely to be an important instrument for combatting moral harassment at work. Employers are obliged to keep this document up to date by recording the results of all risk assessments concerning worker health and safety carried out in the company or its business units. This document is the physical and legal expression of corporate prevention policy. It forms the basis of the employer's liability for non-compliance with obligations concerning prevention, safety, and risk assessment. This single document is intended to identify all occupational risks in the company and include suitable preventive measures, i.e. moral harassment is included among the other risks inherent to the work environment. This single document provides an opportunity for workers and management in the company to hold an annual meeting on

²⁵ L. Lerouge, *La reconnaissance d'un droit à la protection de la santé mentale au travail*, LGDJ, Bibliothèque de droit social, tome 40, § 480.

²⁶ Law n° 82-689 on the freedoms of workers in enterprises of 4 August 1982, *JORF* of 6 August 1982, p. 2518.

²⁷ A. Supiot, "La réglementation patronale de l'entreprise", *Droit Social*, March 1992, p. 215-226.

²⁸ *Op. cit.*

²⁹ Order n° 2001-1016 of 5 November 2001 on the creation of a risk assessment on health and safety of workers, stipulated in article L. 230-2 of the Labour Code (article L. 4121-1 after 2008) and modifying the Labour Code, *JORF* of 7 November 2001, p. 17523.

occupational risks, in order to discuss the current status of this issue in the work environment, e.g.: stress at work, fatigue, suffering, and, of course, moral harassment. The occupational health service, labour inspectorate, and trade unions potentially have a role to play in raising employers' awareness of this issue in the context of the single document.

c. Performance in good faith of the employment contract

The social modernisation law added article L. 1222-1 to the French Labour Code, taking up the civil law principle that contracts must be performed in good faith (article 1134 of the Civil Code) and applying it specifically to employment contracts. Performance of the employment contract in good faith implies a respect for human rights, i.e. the integrity of the employee as a human being. In application of this principle, employers must implement measures to prevent impairing workers' health, so as to ensure that their health is not imperilled as soon as they accept the contractual employment relationship. The imbalance between the parties inherent to employment contracts certainly represents a privileged field for the obligation of good faith, according to the principle of ideal justice in the law on obligations and the relationship of trust between the contracting parties³⁰, especially in the case of moral harassment. While this principle was already strongly affirmed in the Civil Code, the introduction of the obligation of good faith into the French Labour Code is not simply symbolic. From the standpoint of moral harassment, it strengthens the mobilisation of the courts concerning the requirement that the employment contract be performed in good faith³¹.

d. Powers of the Committee on health, safety, and working conditions (CHSWC) and the occupational health service

This broadening to include "physical and mental health" is also valid pour the powers of the Committee on health, safety, and working conditions (CHSWC) and the occupational health service. Indeed, since 2002, to combat moral harassment, the CHSWC's role was extended: "to contribute to protecting the physical and mental health of workers in the business unit, including those employed by outside firms" (article L. 2002-4612 1° of the French Labour Code). According to article L. 4624-1 of the French Labour Code, the occupational health service shall propose individual measures to the employer to protect the mental health of an employee, depending on his/her condition.

e. Immunity of persons reporting moral harassment incidents

In order to protect workers and facilitate the reporting of moral harassment incidents, article L. 1152-2 of the French Labour Code stipulates that employees or persons on training or work-experience contracts may not be penalised, dismissed, or subjected to discriminatory measures for being or refusing to be subjected to repeated instances of moral harassment, or for bearing witness to or reporting such actions. The following article, L. 1152-3, annuls any termination of an employment contract due to lack of knowledge of the definition of moral harassment at work or the protective measures applicable to employees under these circumstances.

³⁰ Vigneau C., "L'impératif de bonne foi dans l'exécution du contrat de travail", *Droit Social*, July-August 2004, p. 706-714 ; Aynès L., "L'obligation de loyauté", *Archives de philosophie du droit*, 2000, p. 195.

³¹ Vigneau C., *op. cit.*

This employee immunity is based on the legislative principle of protecting basic freedoms and acting in the public interest. This principle is part of a broader legislative framework aimed at protecting workers from retaliatory measures when they report reprehensible conduct committed in the enterprise that has come to their knowledge due to their position to the corporate management or relevant authorities (e.g. whistleblowing on maltreatment or corruption)³².

The legislators felt that, in each case, this immunity was justified in order to protect basic freedoms or a higher public interest (the right to dignity, health, etc.). In the case of moral harassment, immunity is justified to ensure that harassment will be reported as soon as possible so that it can be stopped, not only in the interests of the victim, but also those of the employer, who may be held liable³³. The legislators also specified that immunity was not subject to proving the truth of the allegations.

f. The mediation procedure: an innovation in the French Labour Code

The social modernisation law of 17 January 2002 introduced a procedure for “specific mediation to put an end to moral harassment actions” into the French Labour Code for the first time. This provision was thus perceived as an innovation. Article L. 1152-6 of the French Labour Code thus provides for a mediation procedure initiated by any person in an enterprise who feels they have been a victim of moral harassment or by the person accused of that action. The mediator is chosen by agreement between the parties. The mediator obtains information on the status of relations between the parties. S/he attempts to reconcile their differences and submits written proposals for ending the harassment. If mediation fails, the mediator informs the parties of any applicable penalties and the protection granted to the victim under the complaints procedure. However, this procedure can only succeed if both parties accept the advice, opinion, or decisions of the mediator.

Mediation is a useful way of making health issues at work more approachable, particularly in the area of mental health, which is more difficult to assess objectively than physical health. It is intended as a constructive approach to interpersonal relations at work, aimed at improving working conditions. Whether or not mediation is successful, the discussions and proposals it produces are likely to have a positive impact. Corporate institutions responsible for preventing occupational risks may also benefit from this effect. The aim is also to raise employers’ awareness of weaknesses in the health aspects of their corporate organization as well as the extent of their general obligation of prevention and safety. Employers may then decide to take steps that they did not initially consider useful. The aim, therefore, of mediation is to foster respect for employee rights and healthy working conditions from the standpoint of prevention, rather than focusing on compensation for damages or after-the-fact medical care³⁴.

This procedure is, however, relatively little known and hardly used in France. Mediation culture is certainly not as well developed as it is in northern European countries. This is demonstrated by the fact that the conciliation phase, which is mandatory in all

³² J. Duplat, “La nullité du licenciement d’un salarié ayant relaté des faits de harcèlement”, *Semaine sociale Lamy*, 6 April 2009, n° 1394, p. 11-13.

³³ Cf. Cass. soc. 21 June 2006, *D.*, 2006, n° 41, p. 2831, note by M. Miné; *RDT*, p. 245, note by P. Adam, *JCP G*, n°41, II, 10166, note by F. Petit, L. Leblanc, “Harcèlement moral. Responsabilité personnelle du salarié et obligation de résultat de l’employeur”, *RJS*, 8-9/06, p. 670.

³⁴ C. Labbé, “Agir sur le processus de harcèlement : l’enrayer et le prévenir”, *Droit Ouvrier*, June 2002, p. 267-268.

Industrial Tribunal cases, is a constant failure, as only 10 % of the disputes are settled at this stage, while the remaining 90 % go on to court.

g. The role of worker representatives and trade unions

Worker representatives are the first contacts for workers on issues involving working conditions, before the CHSWC, especially as this body does not exist in enterprises with fewer than 50 employees. Their role is to present all individual or collective complaints to employers, especially those concerning the application of laws and regulations on health and safety (Article L. 2313-1 1° of the French Labour Code). The worker representatives may also pass on complaints and observations concerning: “the application of legislative and regulatory provisions that they are in charge of monitoring” (Article L. 2313-1 2° of the French Labour Code) to the labour inspectorate.

Worker representatives have the “right to act as whistleblowers”. If they observe, or are informed by an employee, that there has been a violation of personal rights, physical or mental health, or individual freedoms in the company that is not justified by the type of work to be done, nor proportional to the intended objective, they must inform their employer immediately. The employer must immediately investigate the complaint with the worker representatives and take the necessary steps to correct the situation. If the employer disagrees, fails to acknowledge the reality of the impairment to health, or refuses to agree to a solution, the worker representatives may apply to the Industrial Tribunal for an emergency ruling – provided the employee, who has been informed in writing, does not disagree. The tribunal may then order all the necessary measures to prevent impairment to the employee’s mental health and may also impose a fine for delays (Article L. 2313-2 of the French Labour Code).

Finally, since the 1980s, the trade union organisations have become relatively disengaged from issues concerning health and safety at work. However, a number of recent corporate agreements have covered the issue of stress at work. The most meaningful initiative in recent months is their successful agreement with the employers’ associations to transpose the European framework-agreements on stress at work, harassment, and abuse at work into French law³⁵, whereas three years of collective bargaining on strenuous working conditions had failed to produce an agreement.

Trade unions also act as a sounding-board for the workers to express themselves. The trade unions provide support to enable them to express their opinions directly, as a group, on the content, conditions, and organization of their work. In particular, this makes it easier to define the actions required to improve working conditions. Trade union action, via collective bargaining, makes worker initiatives more effective, so that those aspects of the working environment likely to impact mental health are taken seriously.

B. A legal definition without specific tools in Belgium

Belgium has a system which defines moral harassment at work, as well as recognising other phenomena inherent to “psychosocial risks at work”. Also in 2002, like the social modernisation law in France, Belgium also added an entire chapter to the law on workers’

³⁵ National interbranch agreement (ANI) on stress at work of 2 July 2008; National interbranch agreement (ANI) on harassment; and violence at work of 26 March 2010.

welfare in the performance of their work dated 4 August 1996³⁶ – which transposed the framework-directive dated 12 June 1989 into Belgian law – concerning “specific provisions on violence and moral or sexual harassment at work”³⁷, prescribing measures aimed at encouraging improvements in the health and safety of workers at work. These provisions cover both employees and the people assimilated by law into that category, including employers and even other people present in the workplace, such as customers and suppliers. Although the Belgian system has instituted a high degree of legal recognition of moral harassment at work and psychosocial risks – which makes it very interesting – the legal tools are still relatively underdeveloped.

The Belgian law on moral harassment at work focuses on three points: (1) prevention, (2) the actions open to the victim, and, finally, (3) measures for protecting workers who report that they have been victims of harassment.

1. Measures for preventing moral harassment at work

In the law dated 4 August 1996, article 32(*iii*) defines moral harassment as: “several abusive acts, which may be similar or different, external or internal to the company or institution, that continue over a period of time, with the aim or effect of violating the personality, dignity, or physical or psychological integrity of a worker or another person (...), in the performance of their work, jeopardising their employment, or creating an intimidating, hostile, degrading, humiliating, or offensive environment, manifested, in particular, by words, intimidations, actions, gestures, or written texts. These behaviours may be related, in particular, to religion or other beliefs, handicaps, age, sexual preferences, gender, race, or ethnic origin”. This last sentence integrates “discriminatory harassment”, which was not included in France until 2008.

Employers must implement the necessary measures to promote the workers’ welfare in the performance of their work. They must apply a general prevention policy for that purpose, particularly by introducing measures aimed at combatting violence and moral or sexual harassment in the workplace.

The law dated 4 August 1996 defined three levels of prevention. Firstly, primary prevention, aimed at preventing moral harassment by influencing its origins or contributory factors. All members of the management structure must be consulted and reminded of their obligations in terms of health and safety at work. The prevention committee must also be consulted, conditions in the workplace must be modified, and workers must be informed and trained in health at work relating to welfare issues.

The aim of secondary prevention is to prevent damage that may be caused by abuse or moral or sexual harassment at work. Measures to be implemented include informing all workers how victims may contact their prevention adviser or, if appropriate, employers may appoint one or more “trustworthy people”, with the prior agreement of all the worker representatives on the committee. These people retain their full independence and shall not suffer any prejudice as a result of their role as a “trustworthy person”. They may not act as prevention adviser to the occupational health service at the same time. They must also ensure that an impartial investigation is organised very rapidly into any moral harassment

³⁶ Law n° 1996012650 of 4 August 1996 on workers’ welfare in the performance of their work, *Moniteur belge* of 18 September 1996, p. 24309.

³⁷ Law n° 2002012823 of 11 June 2002 on protection from violence and moral or sexual harassment at work, *Moniteur belge* of 22 June 2002, p. 28521.

cases – e.g. abuse or sexual harassment – and take steps to receive, help, and support people who report themselves as victims.

Finally, the aim of tertiary prevention is damage limitation, i.e. taking care of victims and helping them return to work. Employers must appoint a prevention adviser specialised in psychosocial aspects of work, including abuse and moral or sexual harassment at work. A comparison with the French system on this point reveals a weakness, due to a lack of specialists trained in psychosocial risks, especially on CHSWC. Enterprises with fewer than 50 employees must call on external prevention adviser services. Firms with a prevention adviser specialised in psychosocial aspects of work, including abuse and moral or sexual harassment at work, in their in-house department for prevention and protection may also call on external services, if necessary. If employers do not obtain the prior agreement of all the worker representatives on the Committee on prevention and protection at work to appoint an internal prevention adviser, they must appoint an external prevention adviser. Employers may also appoint one or more “trustworthy people” to assist the prevention adviser.

Besides the employers’ obligations, victims or those who feel they have been victims of moral harassment also have specific means of action.

2. Actions open to victims of moral harassment

Workers who feel they have been victims of abuse or moral or sexual harassment at work have three options. They may choose the internal process, or contact the relevant civil service department, or bring a lawsuit in the appropriate court.

In the internal procedure, the victim contacts the firm’s “trustworthy person” or prevention adviser. When a worker contacts the trustworthy person, s/he takes the lead in dealing with the issue. S/he receives and listens to the complainant, gives advice, and provides the necessary assistance and support. On the worker’s request, the “trustworthy person” may attempt to reconcile the complainant and the presumed harasser. When the worker prefers to contact the prevention adviser or if there is no “trustworthy person” in the company or institution, the prevention adviser takes on the role of listener and arranges conciliation.

If conciliation does not settle the issue or seems impossible, the “trustworthy person” or prevention adviser submits a substantiated complaint, on the complainant’s formal request. A “trustworthy person” must submit the substantiated complaint to the relevant prevention adviser. This official complaint triggers specific legal protection for the complainant. The employer is then informed about the substantiated complaint by the prevention adviser and receives a copy of the document. Appropriate measures must be defined to put a stop to the moral harassment actions. The prevention adviser is in charge of examining the substantiated complaint and proposing suitable measures to the employer. If the moral harassment actions continue following implementation of these measures or the employer fails to take adequate steps, the prevention adviser, following consultation with the victim, contacts the competent civil servant appointed by the King to monitor compliance with the law dated 4 August 1996 and the relevant executory decisions. In this case, the monitoring body will also attempt to settle the situation.

In case of failure, the welfare monitoring service may issue a report or memorandum, which is transmitted to the labour auditor, i.e. the person who plays the role of public prosecutor in the labour tribunal. By expressly involving “welfare” in the labour monitoring body, the Belgian legislators clearly placed the emphasis on working

conditions. On the contrary, despite new developments in French law connected with the social modernisation law, the labour inspectorate maintains a broader role, although there is an acute awareness of psychosocial risks. The law dated 17 January 2002 did not set up a department specialised in working conditions, preferring to emphasise the role of preventive bodies within enterprises.

The labour auditor decides whether it is appropriate to institute criminal proceedings. If the labour auditor decides to prosecute, a summons may be issued for the perpetrator and, in some cases, the employer or a management representative to appear in the magistrate's court. The complainant worker may contact the regional office for monitoring welfare at work that has jurisdiction over his/her employer directly or institute criminal or civil proceedings in the appropriate court. Belgium, like France, has modified the burden of proof in cases of moral harassment. Thus, when a worker submits to the relevant court "evidence indicating the presumption that abuse or moral or sexual harassment at work has occurred", it is up to the defendant to prove that abuse or moral or sexual harassment at work did not take place.

3. Protection for workers who report that they have been victims of harassment

Daring to be a whistleblower or reporting that s/he has been a victim of moral harassment is not only difficult, but may also lead to reprisals against the complainant in the work situation. For this reason, the law dated 4 August 1996 provides several protective measures. These are applicable to workers who submit a substantiated complaint within the enterprise or institution where they work, in application of current procedures, those who submit a complaint to the civil service department in charge of monitoring welfare at work, the police, a public prosecutor or examining magistrate, and those who institute legal proceedings or have proceedings instituted on their behalf, with the aim of ensuring that they are protected from moral harassment. This is also applicable to workers who, in the context of the investigation into the substantiated complaint, submit a dated, signed document to the prevention adviser, stating the facts that they saw or heard personally, relating to the situation described in the substantiated complaint or presented in a witness report in a court case.

Employers are prohibited from terminating an employment relationship or making any unjustified, unilateral change in working conditions, except on grounds totally unconnected with the complaint, legal action, or witness report. The burden of proof is placed on the employer when a worker is made redundant or his/her working conditions are modified unilaterally in the twelve months following submission of a complaint or witness report. The same rules for burden of proof apply if an employer dismisses a worker or unilaterally modifies his/her working conditions following a law suit, until three months after the ruling is final.

If an employer terminates the employment relationship or unilaterally modifies the working conditions, thus violating the provisions of the law on welfare at work, the worker or a workers' organization of which s/he is a member, may request his/her reinstatement in the enterprise or the restoration of the conditions that applied before the events that led to the complaint. An employer who reinstates a worker in an enterprise or institution or restores him/her to his/her previous position, with the working conditions that applied before the events that led to the complaint, is obliged to pay the wages lost due to the dismissal or modification in working conditions, as well as the relevant employer and worker contribution charges. The employer must also pay compensation to the worker if

s/he is not reinstated to the position under the conditions that applied before the events that led to the complaint and the courts have ruled on the dismissal or unilateral modification working conditions, and also when the courts determine that the dismissal or unilateral modification in working conditions was contrary to the provisions aimed at protecting the worker from moral harassment. Finally, the worker chooses the form of compensation: either a lump sum corresponding to six months' gross pay, or the actual damages suffered. In the latter case, the worker must provide evidence of the damages suffered.

In addition to this particularly well-developed legal treatment of moral harassment, its application and interpretation will be facilitated by case law, which has evolved constantly since the social modernisation law was enacted.

III. Constantly evolving case law on French labour statutes

French case law on moral harassment at work developed in two stages. Firstly, the Court of Cassation established a link between moral harassment and the strict obligation to ensure safety (A), then resumed judicial review and broadened the interpretation of the definition (B).

A. Moral harassment at work and the strict obligation to ensure safety

In the history of case law, the concept of a “strict obligation to ensure safety” first appeared in transport law in the 20th century with the ruling handed down by the second civil chamber of the Court of Cassation in the *Compagnie Générale Transatlantique* case on 21 November 1911, then migrated into tort law (particularly in the medical field), and later into health-safety at work law via the 2002 “asbestos rulings”. The strict obligation to ensure safety, therefore, was introduced into social law by the “Asbestos” ruling on 28 February 2002³⁸ and confirmed by the plenary assembly on 24 June 2005³⁹. Failure to fulfil this obligation is considered an inexcusable fault – and facilitates its recognition, while opening up an additional remedy in social security law – when the employer “was, or should have been, aware of the danger to which the worker was exposed and did not take the necessary steps to protect him/her”. This paved the way for full compensation of the damages suffered by the victim. The French Court of Cassation considered that the strict nature of the obligation to ensure safety at work implied that the occupational risk should never have occurred.

The Court of Cassation Chamber for Social and Labour Matters also ruled on 28 February 2006 that employers are not only under a strict obligation to ensure and protect the health of workers in the workplace, but are also liable for guaranteeing its effectiveness. In light of the framework-directive dated 12 June 1989, Pierre Sargos, President of the Court of Cassation Chamber for Social and Labour Matters at the time, considered that the intensity of the safety obligation as defined in the Directive, i.e. “to ensure the safety and

³⁸ T. Aubert-Monpeyssen, M. Blatman, “Les risques psychosociaux au travail et la jurisprudence française : la culture de la prévention” in Lerouge L. (dir.), *Analyse jurisprudentielle comparée des risques psychosociaux en Europe*, L’Harmattan, 2012, p. 67-85 *forthcoming publication*.

³⁹ *Op. cit.*

health of workers in every aspect related to the work”, necessarily constituted a strict obligation⁴⁰.

On 21 June 2006, the Court of Cassation Chamber for Social and Labour Matters finally applied this strict obligation to ensure safety to moral harassment at work, following the enactment of the law dated 17 January 2002. In the *Propara*⁴¹ case that gave rise to this remarkable ruling, several workers had complained about their manager's brutal, rude, humiliating, and insulting behaviour, reporting threats, denigration, intimidation, and unjustified disciplinary measures at work. These actions were recognised and confirmed by a labour inspectorate report, which concluded that the manager in question was responsible for “widespread moral harassment resulting in a deterioration in working conditions, and a violation of the personal rights and dignity of certain workers, leading to an impairment of their physical and mental health”.

The Court of Cassation ruled on the actions constituting moral harassment at work, linking them with the employer's strict obligation. This ruling thus opened the door to effective integration of mental health, on an equal footing with physical health, in the employer's strict obligation to ensure safety. As a result, employers cannot be exonerated from liability, even if they have implemented measures to prevent moral harassment in the company and its business units, including cases where other misconduct contributed to the harassment. The Court of Cassation considered that these actions should not have happened.

Furthermore, an employer who takes no action although s/he is aware that an employee is responsible for moral harassment of a subordinate may be ordered to pay damages for “unfair non-feasance of the employment contract”⁴². Similarly, an employer may be liable for breach of an employment contract if s/he has not taken the necessary steps to prevent moral harassment of one worker by another⁴³. In an even more severe ruling, on 8 October 2007, the Grenoble Court of Appeal ruled that an employer was liable for failing to take sufficient steps to avoid harassment of a company employee by one of his/her subordinates⁴⁴. The fact that a manager was convicted for: “managerial behaviour leading to suffering at work” did not exonerate the employer from liability. The conviction of a subordinate for moral harassment and the absence of misconduct by the employer did not exonerate him/her from liability. The objective of these severe court rulings is not only to protect workers, but also to encourage employers to implement effective policies to prevent moral harassment in their companies, in order to avoid liability under this heading.

These actions are extremely serious, as they constitute a violation of human rights and the workers' right to dignity, enshrined in article 26 of the European Social Charter and article L. 1121-1 of the French Labour Code. Consequently, according to article L. 4122-1 of the French Labour Code, “each worker has a duty of care, as permitted by his/her training and capacities, of his/her own health and safety, as well as those of other people affected by his/her actions or omissions at work”. An employee who commits acts

⁴⁰ P. Sargos, “L'émancipation de l'obligation de sécurité de résultat et l'exigence d'effectivité du droit”, *JCP S*, 4 April 2006, 1278 note in Cass. soc. 28 February 2006, n° 05-41.555.

⁴¹ Cass. soc. 21 June 2006, *D.*, 2006, n° 41, p. 2831, note by M. Miné ; *RDT*, p. 245, note by P. Adam, *JCP G*, n°41, II, 10166, note by F. Petit, L. Leblanc, “Harcèlement moral. Responsabilité personnelle du salarié et obligation de résultat de l'employeur”, *RJS*, 8-9/06, p. 670.

⁴² Cass. soc. 7 February 2007, *RDT*, April 2007, p. 249, note by M. Véricel.

⁴³ Cass. soc. 21 February 2007, n° 05-41.741, unpublished.

⁴⁴ CA Grenoble, 8 oct. 2007, n° 06/02282 ; Adam P., “L'obligation de sécurité de résultat ne s'épuise pas dans la sanction disciplinaire”, *Semaine Sociale Lamy*, 13 May 2008, n° 1353, p. 11.

likely to violate the dignity of another employee is personally liable, even if s/he was acting in the employer's interest or on his/her orders. However, the Court of Cassation report considered that an employee who committed repeated, intentional actions of this kind was personally liable⁴⁵. The Criminal chamber issued a similar ruling on 28 March 2006⁴⁶.

Finally, in 2009, the Court of Cassation issued a wealth of clarifications concerning the legal system governing moral harassment at work, especially with the publication of the ruling dated 24 September 2008 concerning the judicial review of moral harassment at work⁴⁷. These decisions show the strict approach of the Court of Cassation, who interpreted the concept of moral harassment so broadly that the borderline between harassment and suffering at work has become less clear⁴⁸. In a ruling dated 10 February 2009, the Court of Cassation overturned a previous ruling that there was real and serious cause for dismissing an employee who had accused a line manager with harassment without proving the case, which constituted an abuse of freedom of expression. According to the Chamber for Social and Labour Matters, “repeated actions constituting moral harassment, which intentionally or unintentionally deteriorate an employee’s working conditions and are likely to violate his/her dignity and impair his/her health’ certainly described the behaviour of an HRD who, as reported in witness statements received by the court ruling on the facts of the case, treated his subordinates ‘harshly’ and exhibited inappropriate behaviour towards the victim, who told a colleague how frightened she was when the manager became angry and violent towards her”. However, although, according to certain authors, the concept of “harassment” seems to be moving closer to that of “suffering at work”, these are two distinct concepts. Indeed, the law only deals with moral harassment per se. The national multi-industry agreement dated 2 July 2008 defines suffering at work as: a state of stress that occurs when there is an imbalance between a person’s perception of his/her work and his/her own capacities to do it. While harassment may be a potential stress factor, it is based on specific, deliberate actions attributable to the employer, a manager, or another employee, likely to impair a worker’s physical or mental health, or jeopardise his/her future career⁴⁹.

The Court of Cassation Chamber for Social and Labour Matters adopted a protective stance towards employees, particularly when they report that they have been victims of moral harassment. In this type of situation, it is often difficult for the employee involved to provide evidence of harassment. The Court of Cassation considered, therefore, in the ruling dated 10 March 2009, that it must be proved that the employee acted in bad faith to constitute abuse of freedom of expression. The employer is also required to prove that the employee clearly intended to do harm. In this particular case, the dismissal letter did not contain any clear evidence of the bad faith of the employee who had just been made redundant⁵⁰.

⁴⁵ Annual report by the Court of Cassation 2006, p. 281, http://www.courdecassation.fr/IMG/pdf/cour_cassation-rapport_2006.pdf.

⁴⁶ Cass. crim. 28 March 2006, *RTD Civ.*, 2007, n° 1, p. 235, note by P. Jourdain, *JCP G*, 2006, n° 47, II, JP, 10188, note by J. Mouly, *Gaz. Pal.*, 2006, n° 298, p. 22, note by Y. Monnet, *JCP S*, 2006, n° 23, p. 28, note by J.-F. Cesaro.

⁴⁷ *Cf. infra*.

⁴⁸ Cass. soc. 10 February 2009, *JCP S*, n° 21-22, 19 May 2009, p.28-29, note by F. Pelletier “D’un comportement “rude” au harcèlement moral”.

⁴⁹ *Ibid.*

⁵⁰ Cass. soc. 10 March 2009, *Droit. Ouvrier*, September 2009, p. 456-457, note by P. Rennes.

Thus, in a ruling dated 29 April 2009, the Court of Cassation ruled that an employee who brings allegations of moral harassment must present evidence, which is disclosed to the defendant, who is then required to prove that the actions in question did not constitute harassment and that his/her decision to dismiss the worker had no connection with the harassment issue. The Court of Appeal did not examine whether the facts established by the employee justified the presumption of moral harassment, although the complainant reported the consequences of these actions on his health and work, nor did they give legal grounds for their decision to dismiss the employee's claim for damages resulting from moral harassment.

On 30 April 2009, taking into account the modifications in the law dated 27 May 2008, which introduced several adaptations to European law in the area of combatting discrimination, the Chamber for Social and Labour Matters specified that it was up to the courts to consider the facts taken as a whole and determine whether the presumption of harassment was justified. It is, therefore, necessary to examine the grounds for harassment, which has become increasingly discriminatory since the concept of discrimination was introduced into the legal definition. The complainant is only obliged to present evidence to support the presumption that moral harassment has occurred. Consequently, the Court of Appeal could not reject the employee's suit merely on the grounds that his state of health was unrelated to the deterioration in working conditions⁵¹. The dismissal was, therefore, automatically null and void.

Finally, despite the now very active involvement of labour tribunals in moral harassment cases, the Court of Cassation ruling dated 1 July 2009 set limitations on the courts' powers to interfere in contractual relations. Indeed, the Court of Cassation stated that, in application of article L. 1152-4 of the French Labour Code, employers must take all necessary steps to prevent moral harassment, but the courts do not have the power to order the modification or termination of the employment contract. Consequently, the courts cannot order an employer to impose disciplinary measures on employees responsible for harassment. It is up to the employer to decide whether disciplinary measures are required⁵².

Besides the applying the strict obligation to ensure safety to cases of moral harassment, the Court of Cassation Chamber for Social and Labour Matters also examined the implications of the legal definition of moral harassment.

B. Extensive interpretation of the definition of moral harassment by the Court of Cassation

The legal definition of moral harassment at work and the broadening of this concept have, in particular, been interpreted by the Court of Cassation in determining what constitutes moral harassment (1). The Court of Cassation thus adopted an extensive interpretation of this definition (2).

1. Resumption of the judicial review of moral harassment at work

Judicial review is required to ensure that the law on moral harassment at work, as defined by the social modernisation law, is applied properly, without any abuse of rights.

⁵¹ Cass. soc. 30 April 2009 n° 07-43.219, *Semaine Sociale Lamy*, 12 May 2009, n° 1399, p. 15 ; Cass. soc. 30 April 2009 n° 07-43.219, *Droit Social*, July-August 2009, p. 870-871, obs. P. Chaumette.

⁵² Cass. soc. 1^{er} July 2009, *JCP S*, n° 39, 22 September 2009, n° 1418, note by C. Leborgne-Ingelaere.

The Court of Cassation initially issued a ruling on 27 October 2004⁵³, stating that it was up to the court of first instance to determine whether the facts of the case constituted moral harassment, referring to their sovereign right to assess whether the evidence met the relevant legal criteria. The Court of Cassation decided only to review the causation, as stipulated in article 455 of the New Civil Procedure Code⁵⁴. The Court maintained this position in two further rulings, issued on 23 November 2005 and 26 September 2007, relying on the trial court's decision concerning the existence of moral harassment⁵⁵. However, on 24 September 2008, the Court of Cassation Chamber for Social and Labour Matters issued four decisions that overturned the 2004 case law on judicial review of lower court rulings on harassment. From that date on, the Court of Cassation judges decided to review the evidence themselves, giving several reasons for this change.

Indeed – and this clearly demonstrates the importance of European law – in light of the Council directive dated 27 November 2000, introducing a general framework in favour of equal treatment in work and employment⁵⁶, the Court of Cassation decided to review their position on the distribution of the burden of proof between employees and employers in harassment cases. In their rulings dated 24 September 2008, they did not simply review the causation, but also carried out a judicial review of cases involving moral harassment at work. Consequently, the complainant is now responsible for providing evidence to prove the alleged facts. The court must examine these facts and determine whether, *taken as a whole*, they confirm that the alleged harassment actually took place. It is then up to the employer to establish that these actions did not constitute harassment⁵⁷. Courts of Appeal that had not taken all of the evidence provided by the complainant into account were criticised⁵⁸.

This reversal of case law by the Court of Cassation on 24 September 2008 nevertheless raised the issue of the necessity of a judicial review of moral harassment at work. This re-examination was found to be necessary for several reasons, despite some reservations on the subject.

Judicial review of these rulings on moral harassment at work raises issues related to the very concept of “moral harassment”, which is complex and extremely subtle, and thus not very well suited to the usual review procedures of the Court of Cassation⁵⁹. Nevertheless, there are several possible explanations for what could be described as the Court of Cassation's re-appropriation of the judicial review of moral harassment rulings by lower courts.

The Court of Cassation has jurisdiction over assessing whether the decisions of lower courts are compliant with the law, but is not supposed to review the facts. However, they

⁵³ Cass. soc. 27 October 2004, *Semaine Sociale Lamy*, n° 1193, p. 11, *RJS*, 1/05, n° 4, *Droit Social*, January 2005, p. 100, obs. C. Leroy-Loustaunau.

⁵⁴ J.-Y. Frouin, “Sur le contrôle par la Cour de cassation de la qualification juridique de harcèlement moral”, *RJS*, 10/05, p. 671.

⁵⁵ Cass. soc. 23 November 2005, *Bull. V*, n° 334, *Droit ouvrier*, June 2006, p. 307, *Droit Social*, February 2006, p. 229, obs. by J. Savatier, *JCP S*, 2006, n° 7-8, p. 18, note by P. Morvan; Cass. soc. 26 September 2007, n° 06.43-029, unpublished.

⁵⁶ Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation, *JOCE* L 303 of 2 December 2000, p. 16.

⁵⁷ Cf. Communication by the Court of Cassation on rulings n° 1611, 1612, 1613 and 1614 of 24 September 2008; L. Lerouge, “Le contrôle de qualification du harcèlement moral au travail. À propos des quatre arrêts rendus par la Chambre sociale de la Cour de cassation le 24 septembre 2008”, *Petites Affiches*, n° 1 and 2, January 2009, p. 7-14.

⁵⁸ Appeals n° 06-45.747 and 06.45.794.

⁵⁹ Cf. P. Adam, “Un contrôle, dans quel dessein?”, *Semaine Sociale Lamy*, 29 September 2008, n° 1368, reported by Françoise Champeaux, p. 12.

are supposed to review the legal interpretation of the evidence in cases where legislation gives or creates a legal definition, accompanied by specific legal consequences. The Court of Cassation does not review the material evidence admitted by the lower courts, but ensures that the legal interpretation of the evidence was correct⁶⁰. However, the issues concerning the legal definition of moral harassment, enshrined in the social modernisation law, have made it necessary and, in some cases, essential, for the court to interpret this new and complex concept, rather than leaving it up to the court of first instance⁶¹.

This is particularly important as a case of moral harassment at work may have very severe legal consequences for the person convicted. Also, with respect to the directive dated 27 November 2000, setting up a general framework to promote equal treatment in work and employment, a judicial review of the lower court's interpretation by the Court of Cassation Chamber for Social and Labour Matters seems appropriate to uphold the principle of equality of all parties before the courts⁶². Nevertheless, some room for manoeuvre must be retained concerning the burden of proof, to protect the rights of workers who whistleblow on practices at work that violate their dignity or affect their mental health. However, some authors feel that a greater focus on “intent to do harm” would contribute to a more precise definition of this phenomenon, thus reducing slanderous whistleblowing or the misplaced use of the term “moral harassment at work”⁶³.

A judicial review of the definition of moral harassment may also be justified in the context of harmonising the case law of the Criminal chamber and the Chamber for Social and Labour Matters, as the definitions of moral harassment in the French Criminal and Labour Codes are identical. In their ruling dated 21 June 2005⁶⁴, the Criminal chamber of the Court of Cassation carried out a judicial review of the elements required to constitute the offence of moral harassment⁶⁵. The Criminal chamber felt that Court of Appeal clearly described the material and intentional elements: “provided there was clear evidence that the employer was responsible for repeated actions with the purpose or effect of causing a deterioration in working conditions likely to impair the victim’s rights”. The Chamber for Social and Labour Matters has now adopted the same policy, via a decision dated 24 September 2008, which seemed less concerned than that of the Criminal Chamber with the definition of moral harassment stated in articles L. 1152-1 to L. 1152-3 of the French Labour Code, particularly, in any event, in view of their pragmatic assessment of the variety of actions likely to be recognised as moral harassment⁶⁶.

Other authors consider that, similarly to the issue of real and serious grounds for dismissal⁶⁷, the lack of a judicial review of the definition of moral harassment at work since the decision dated 27 October 2004 has resulted in a risk of arbitrary court rulings. A causation review only made it possible to overturn rulings where the courts did not provide

⁶⁰ J.-Y. Frouin, “Sur le contrôle par la Cour de cassation de la qualification juridique de harcèlement moral”, *RJS*, 10/05, p. 671.

⁶¹ P. Waquet, “Un contrôle naturel et nécessaire”, *Semaine Sociale Lamy*, 29 September 2008, n° 1368, reported by Françoise Champeaux, p. 11.

⁶² Cass. soc. 24 sept. 2008, *JCP S*, 2008, n° 42, p. 37, note by C. Leborgne-Ingelaere.

⁶³ P. Adam, “Harcèlement moral (managérial), dénonciation d’actes répréhensibles par le salarié et réaction patronale”, *Droit Ouvrier*, January 2008, p. 1.

⁶⁴ Cass. crim. 21 June 2005, *Bull. crim.*, n° 187.

⁶⁵ A. Martinel, “Harcèlement moral et contrôle de la Cour de cassation”, *Semaine Sociale Lamy*, 29 Sept. 2008, n° 1368, p. 5.

⁶⁶ Cf. Cass. soc. 23 November 2005 *JCP S*, 2006, n° 7-8, p. 18, note by P. Morvan.

⁶⁷ Cf. J. Pélissier, A. Supiot, A. Jeammaud, *Droit du travail*, Dalloz, Coll. Précis, 2008, § 466 on the actual and serious cause for dismissal.

any grounds for their decision or contradicted themselves. However, the Court of Cassation's judicial review of the definition on 24 September 2008 may be considered beneficial, provided it does not result in a challenge to the interpretation built up by case law and legal theory over the past six years⁶⁸.

Finally, the diversity of interpretations in the lower courts alone may justify the Court of Cassation's decision to resume a judicial review of moral harassment at work cases. The situation is similar concerning ambiguities in the case law of the Court of Cassation itself.

2. Broadening the definition of moral harassment at work

While the requirement that the actions be repeated to prove "harassment" is maintained as an intrinsic criterion, two rulings by the Chamber for Social and Labour Matters on 10 November 2009 have resulted in a considerably broader definition. Following the resumption of judicial review of the proof of moral harassment at work by the Court of Cassation on 24 September 2008⁶⁹, 2009 was a very important year in terms of defining the boundaries of moral harassment. On 10 November 2009, the Chamber for Social and Labour Matters continued in the same vein by examining the issue of the intentions of the perpetrator of actions constituting moral harassment at work within the definition of moral harassment⁷⁰. In future, moral harassment may be identified in the absence of malicious intent, whereas the rulings issued on 24 September 2008 had envisaged a more restrictive concept. Apparently, however, a few unpublished rulings handed down in 2009 indicate the acceptance of a broader view⁷¹.

The Court of Cassation Chamber for Social and Labour Matters considered that moral harassment, according to articles L. 1152-1 and L. 1154-1 of the French Labour Code, is "independent of the intentions of its perpetrator". The actions simply need to be repeated and have the effect of deteriorating the working conditions, in a way "resulting in a violation of the rights and dignity of workers, leading to an impairment of their physical and mental health or jeopardising their future career". This very broad interpretation of the definition of moral harassment, eliminating the requirement to prove the perpetrator's malicious intent, is likely to give rise to "harassment around every corner" or a sort of "involuntary harassment"⁷².

Furthermore, when asked whether management methods could, in some cases, constitute moral harassment at work, the Court of Cassation gave a positive answer on 10 November 2009. Indeed, according to a very clear principle stated by the Chamber for Social and Labour Matters, moral harassment may occur when "management methods implemented by a line manager lead to a particular employee being the target of repeated actions with the purpose or effect of producing a deterioration in working conditions likely to violate their rights and dignity, impair their physical or mental health, or jeopardise their future career"⁷³.

⁶⁸ P. Adam, "Un contrôle, dans quel dessein ?", *op cit*.

⁶⁹ *Op. cit.*

⁷⁰ L. Lerouge, "La constitution du harcèlement moral au travail indépendamment de l'intention de son auteur", note sous Cass. soc. 10 November 2009 n° 08-41.497, *Petites Affiches*, n° 28, 9 February 2010, p. 18-21.

⁷¹ Cass. soc. 5 May 2009, n° 07-45.397 ; Cass. soc. 13 May 2009, n° 08-46.610 ; Cass. soc. 17 June 2009, n° 07-43.947 ; *Liaisons sociales Quotidien*, 26 Nov. 2009, n° 15492.

⁷² See on this issue P. Adam, "Harcèlement moral : la place (incontournable) de l'intention malveillante. De l'intérêt d'une lecture combinée des articles L. 1152-1 et L. 1154-1 du Code du travail", *SSL*, n° 1404, 15 June 2009, p. 8.

⁷³ L. Lerouge, "Vers la qualification de méthodes de gestion de harcèlement moral ?", note in Cass. soc. 10 November 2009 n° 07-45.321, *Petites Affiches*, n° 21, 29 January 2010, p. 9 - 12.

C. Compensation for the effects of moral harassment at work

The social security courts' interpretation of moral harassment deals with care for the victim's health in the context of occupational health legislation. Some employees have attempted to have moral harassment as the cause of their depression recognised as a work-related accident. This was a poor line of argument as moral harassment due to repeated actions is obviously excluded from the scope of industrial accidents, for which an element of suddenness must be proved. However, even if a Court of Cassation ruling dated 24 May 2005 rejected this claim, confirming that suddenness was a criterion for recognising work-related accidents, they still took the time to restate the legal criteria, which require a drastic deterioration in the victim's mental faculties connected with the moral harassment⁷⁴. The courts may consider that the consequences for mental health constitute a work-related accident when they are sudden and extreme, i.e. when an employee "cracks" under the pressure of a deterioration in working conditions caused by moral harassment, or even due to work organization (suicide, sudden depression). This also means that a diffuse depression, i.e. the most common type, is not covered by legislation on industrial accidents, but rather by the provisions on occupational diseases.

Recognised incidents of moral harassment (e.g. an emotional shock following a violent disagreement over the telephone with a manager, following a considerable deterioration in relations over the previous months) may result in psychological consequences that prevent the person from returning to work. For example, the Versailles Court of Appeal classified fainting due to an emotional shock following recognised incidents of moral harassment as a work-related accident⁷⁵.

Even when the symptoms of mental deterioration leave no doubt as to their classification as a work-related accident, it is difficult to determine the trigger factor. The onset of the pathology must be correlated with an event associated with an emotional shock that occurred in the workplace for the principle of presumption of cause and effect to be applicable. Thus, some courts may admit a causal link between moral harassment at work and the victims' depressed state, resulting in their committing suicide⁷⁶. Furthermore, while the ruling issued by the second civil chamber of the Court of Cassation on 3 April 2003 refused to classify moral harassment at work as a work-related accident, they did not exclude the possibility that moral harassment was a potential cause of the victim's suicide, making it possible to benefit from the legislation on industrial accidents⁷⁷. Proof was required that the harassment and emotional shock that occurred at work constituted the trigger event that caused the victim to attempt to commit suicide.

The Court of Cassation also ruled on the link between moral harassment at work and attempted suicide. The Court of Cassation ruling on 22 February 2007 was remarkable from this standpoint. Besides its importance in terms of Social Security benefits for the consequences of moral harassment at work, as well as suicide, the second civil chamber of the Court of Cassation based their decision on the employer's strict obligation to ensure the workers' safety, confirmed by the plenary assembly of the Court of Cassation on 24 June

⁷⁴ Cass. civ. 2nd 24 May 2005, *JCP S*, n°1, June 2005, n° 1019, note by X. Prétot ; *RJS*, 8-9/05, n° 901 ; *Lexbase Hebdo*, édition sociale, n° 172, 16 June 2005, note by C. Willmann.

⁷⁵ CA Versailles 20 March 2000, *LPS*, 2003, n° 1915.

⁷⁶ TASS Dijon 1^{er} December 2002, TASS Grenoble 18 oct. 2002, *Droit. Ouvrier.*, 2003, p. 123, note by L. Millet.

⁷⁷ Cass. civ. 2nd 3 April 2003, *Droit Ouvrier*, Jan. 2004, p. 21, note by F. Saramito.

2005⁷⁸ and applied to moral harassment in the ruling dated 21 June 2006⁷⁹. Furthermore, the Court of Cassation ruling on 15 November 2006 stipulated that the fact that, even before the health consequences were covered by social security benefits, the legislation on industrial accidents and occupational diseases did not preclude compensation being awarded to the worker for damages caused by moral harassment⁸⁰.

While the labour and social security tribunals are directly involved in cases of moral harassment at work, the French Labour Code also provides for a criminal sentence.

IV. Conclusion

As we have seen, in order to compensate for a legal definition of moral harassment considered to be too general, the courts have used their power to interpret the texts in case law and define the boundaries of moral harassment at work, perhaps too broadly. Indeed, trapped to some extent by a legal remedy that has been “in vogue” since 2002, the Court of Cassation adopted a considerably broader definition of moral harassment, in order to cover situations that are not necessarily moral harassment per se, but certainly deserve prosecution.

Also, provisions such as the performance in good faith of the employment contract (art. L. 1222-1 of the French Labour Code) and the general obligation to ensure safety (art. L. 4121-1 of the French Labour Code) are currently under-utilised to prosecute in situations related to psychosocial risks at work, but which do not constitute moral harassment, like the concept of “psychosocial burden”, introduced in the Belgian system in 2007⁸¹, which includes stress, conflicts, violence, and moral or sexual harassment at work. The case law of the French Court of Cassation was certainly stimulated by the supranational context surrounding the framework-directive dated 12 June 1989, marked by the swing from a risk compensation approach to a prevention-based system.

⁷⁸ Cass. Plén. Ass. 24 June 2005, *JCP S*, n° 3, 12 July 2005, n° 1056, note by P. Morvan ; *D.*, 2005, n° 34, p. 2375, note by Y. Saint-Jours ; *Dr. Soc.*, n° 11, November 2005, p. 1067, note by X. Prétot.

⁷⁹ *Op. cit.*

⁸⁰ Cass. soc. 15 November 2006, *RDSS*, n° 2/2007, p. 356, note by M. Badel, *Semaine Sociale Lamy*, 12 December 2006, p. 20, note by J.-E. Tourreil, *JCP E*, 2007, n° 9, p. 47, note by G. Vachet.

⁸¹ According to the royal decree of 17 May 2007, the “psychosocial burden” at work is “any burden originating from the performance of work, which occurs during the performance of work and has prejudicial consequences for the person’s mental or physical state”.

Workplace Bullying in United Kingdom

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Background

Interest in and awareness of the issue of workplace bullying emerged in the UK in the early 1990s. Through a series of radio-programmes the journalist and broadcaster Andrea Adams, who is believed to have originally coined the term ‘workplace bullying’, explored the problem and its significance in UK workplaces. The programmes and the following media debate functioned as an eye-opener for a wider audience and, with the landmark publication of the book “Bullying at work: How to confront it and overcome it” (Adams, 1992), the interest in the issue quickly gained momentum. Within a time-span of less than ten years, the phenomenon of bullying found a resonance with large sections of the British public. Supported by empirical evidence (e.g. Hoel, Cooper and Faragher, 2001; UNISON, 1997, Quine 1999), suggesting that a substantial proportion of the UK working population perceived themselves to be bullied, with implications for individuals, organisations and society alike, the issue gradually moved upwards on the agenda of trade unions, organisations within the private and the public sectors, as well as within Governmental agencies.

Current situation with regard to workplace bullying

Prevalence

In terms of prevalence, although methodologies by which evidence has been obtained vary, most studies have reported figures in the order of 10-20%. For example, Hoel and Cooper (2000) in a random nationwide survey involving 70 organisations with altogether more than one million employees, found that 10.6% of respondents reported themselves to be bullied. Whilst a study in a large multinational organisation reported that 15% considered themselves bullied (Cowie et al., 2000), other studies carried out with trade union members have often reported even higher figures, with a recent study of members of the largest UK public-sector union reporting a figure of 34% (UNISON, 2009). By contrast, two relatively recent studies, both large-scale and using representative samples of the UK population, found lower prevalence rates, reporting figures of four and five percent respectively (Grainger and Fitzner, 2007, Fevre et al., 2009), or in the latter case 7% when experience of working for a former employer is also included. Notwithstanding, it is worth noting that in these studies respondents were interviewed face-to-face in their own homes, a method which is likely to yield lower numbers than a survey, whether paper-based or carried out on-line. Still, even with a prevalence rate of 4%, Grainger and Fitzner (2007)

nevertheless concluded that bullying and harassment is a serious problem in UK workplaces, affecting around one million workers.

Whilst most studies in the UK found no difference in prevalence for men and women, a recent development in research on bullying in the UK is the growing recognition that certain minority groups experience particularly high levels of bullying. For example, several studies have suggested that ethnic minorities are vulnerable to bullying (e.g. Lewis and Gunn, 2007), although the experience varies between ethnic minorities as well (Hoel and Cooper, 2000). Furthermore, the two Fairness at Work surveys (Grainger and Fitzner, 2007 and Fevre et al., 2009) found that disabled employees as well as lesbians, gay men and bisexual (LGB) employees were particularly at risk of bullying, with prevalence rates of bullying double those of the general population. As far as disabled employees are concerned, those with long-term illnesses, learning difficulties and psychological conditions were particularly at risk, also reporting exceptionally high levels of exposure to physical violence. By contrast, employees with physical disabilities reported prevalence rates similar to the non-disabled population (Fevre et al., 2008).

Whilst there exists uncertainty with regard to which occupations are associated with the highest risk of bullying, there appears to be consensus about the fact that bullying is more widespread in the public than in the private sector (Hoel and Cooper, 2000; Fevre et al., 2009).

There has been some discussion about whether the level of bullying has been on the rise in recent years. Thus, the previously reported prevalence rate of 34% in 2009 among members of the public sector union UNISON (UNISON, 2009) suggested a near doubling of the number (18%) from a similar study undertaken ten years earlier UNISON, 1999). However, this view is not supported by the two most recent representative samples, which only report a slight increase from four to five percent (Grainger and Fitzner, 2007, Fevre et al., 2009).

A critical distinguishing factor of the British pattern of bullying (Beale and Hoel, 2010), is the identification of someone in a managerial or supervisory role or capacity as the main culprit and the victim likely to be a subordinate (Rayner, Hoel and Cooper, 2002, UNISON 1999, 2009), with managers responsible in 70-80% of incidents. The fact that the predominant pattern of bullying in the UK is top-down also means that some managers are victimised by their superiors (Hoel et al. 2001). By contrast, approximately one third of alleged perpetrators are to be found among colleagues (whilst being bullied by a subordinate is reported by less than 10%)(Hoel and Cooper, 2000, Grainger and Fitzner, 2007). Clients are also identified as the culprit or perpetrator by some targets, with the majority of complaints of this type occurring in customer or client-facing services such as teaching, the health service sector, retail and the hospitality industry.

The majority of targets reported being bullied either alone or together with some of their work colleagues (Rayner et al, 2002). Also, as reported in Beale and Hoel (2010), there seems to be a qualitative difference between being singled out for negative treatment and being bullied alone, as opposed to being bullied together with the rest of the work group. Whilst the first category of experience may be referred to as 'victimisation', the latter form may be characterised as an 'oppressive work regime' (Beale and Hoel, 2010).

Consequences

The consequences and impact of bullying, and ultimately the costs it incurs, have received considerable attention in the UK debate about the issue. Whilst the debate in some

countries seems to have focused on the consequences of bullying for the individual, the business case or the costs to organisations seem to have dominated the UK debate on consequences. In this respect Giga, Hoel and Lewis (2008a) were commissioned by the Dignity at Work Partnership (see below) to produce a report assessing the cost of workplace bullying. The report systematically reviewed research on costs of bullying to the individuals, organisations and society. It is somewhat difficult to disentangle entirely the UK contribution to this body of knowledge as there seems to be little that can be attributed to the UK context alone, as many UK findings seem to replicate findings emerging in other countries. Therefore, in terms of individual consequences, UK studies have confirmed that bullying is associated with negative psychological and physical health outcomes (e.g. Hoel, Faragher and Cooper, 2004; Quine, 1999; 2001). Interestingly, according to Hoel et al. (2004) context may play a role here as some behaviour and experiences seem to be associated with particularly negative outcomes.

In terms of organisational costs, a distinction is made between direct and indirect costs (Hoel, Sparks and Cooper, 2002), with direct costs associated with factors such as injuries, sickness absence and turnover, whilst indirect costs will include factors such as short and long-term effects of bullying on targets and witnesses. In estimating direct costs, the relationship between bullying and absenteeism appears to be rather weak (Hoel et al. (2011), despite the fact that a UK online survey for the trade union UNISON (N=7,151) reported that a third of victims had taken time off due to bullying (UNISON, 2009). For example, in line with most international research Hoel & Cooper's (2000) nationwide British study reported weak correlations between self-reported bullying and total exposure to negative acts respectively, on the one hand, and sickness absenteeism, on the other. Still, it is worth noting that in Hoel and Cooper's (2000) study, victims of bullying reported having taken seven more days off work than those who had no experience of bullying, directly or indirectly as witnesses or bystanders. By contrast, much UK research has emphasised the negative impact of bullying on turnover (Rayner et al., 2002). Thus, compared to the figures for absenteeism, Hoel and Cooper's (2000) nationwide study reported moderate to relatively strong correlations between bullying and intention to leave, both for self-reported bullying and exposure to negative acts. A significant association between bullying and intention to leave was also reported by Quine (1999) in her study of the UK National Health Service (NHS). With bullying consistently found to be strongly associated with job-satisfaction (Hoel & Cooper, 2000; Quine, 1999, UNISON, 1999, 2009), it is not surprising that bullying is seen to negatively affect performance and productivity. Whilst correlation for self-rated performance has been found to be relatively weak (Hoel and Cooper, 2000), Hoel, et al.(2002) estimated that a total drop in UK productivity of 1.5-2% may be attributable to bullying when comparing performance levels for targets and non-targets. It has been suggested, albeit with considerable reservations, that bullying could cost the UK economy as much as £13.75 billion annually (Giga et al., 2008a). And, although such figures might be somewhat exaggerated, they have attracted considerable interest from employers (CIPD, 2005), and no doubt contributed to overall interest in the subject.

Background and reasons for the occurrence of workplace bullying

Most empirical studies undertaken in the UK have been focused on establishing potential links between work-environment quality factors and workplace bullying. Consequently studies have often reported elevated levels of bullying in what has been reported as negative work environments (e.g. Coyne et al., 2003), where workloads were seen to be high or excessive and relationships at work negative or problematic (e.g. Hoel and Cooper, 2000; UNISON, 1999; 2009). Similarly, bullying has been seen to be associated with organisational change (Hoel and Cooper, 2000), in particular change of supervisor or manager (Rayner et al., 2002). By contrast, studies have found little support for a link between precarious work and bullying, with employees with full-time and permanent employment contracts more at risk than those with temporary and part-time work (e.g. Hoel and Cooper, 2000).

Style of leadership is another potential antecedent of bullying which has recently received considerable interest in UK and international research. Based on a large UK sample (N=5,288) Hoel et al. (2010) explored the relationship between four styles of leadership (autocratic; participative; laissez-faire; and non-contingent punishment), on the one hand, and self-reported and observed bullying, on the other. Whilst observed bullying was found to be directly associated with an autocratic style of leadership, self-reported bullying was seen to be linked to non-contingent punishment, a style of leadership where punishment is applied arbitrarily, (Podsakoff, Todor and Skov, 1982), and to a lesser extent to laissez-faire leadership, but not to an autocratic style of leadership. To make sense of these findings, Hoel et al. suggested that whilst autocratic leadership to the observer easily may be interpreted as unfriendly and as bullying, for the targets themselves, although negative and unwelcome, behaviours and actions in line with an autocratic style are predictable and are seen as something one may protect oneself against. Such a style is also likely to affect one's colleagues. By contrast, a style of leadership using non-contingent punishment, is hard to escape and difficult to make sense of. Because such a style may not affect everyone equally, complaints about bullying may not be understood or believed as colleagues may have different experiences.

Explanations of bullying have also been sought in professional socialisation processes, whereby new entrants and trainees have been socialised to see negative behaviour and bullying as acceptable, and even justified in certain situations, with the result that such behaviour gradually becomes normalised and remains unquestioned, and is thus likely to be reproduced by new entrants to the profession. Empirical explorations have revealed the impact of such processes in the British fire service (Archer, 1999), among nurses (Hoel, Giga and Davidson, 2007) and within commercial kitchens (Bloisi and Hoel, 2008).

Several UK contributions have tried to explain bullying in light of the political and economic industrial relations climate in the UK and the capitalist employment relationship (e.g. Beale and Hoel, 2010; 2011; Hoel and Beale, 2006). In this respect, it is argued that in some circumstances and contexts, bullying can act as "a tool of managerial control that can sit alongside other control methods and approaches, and can supplement them" (Beale and Hoel, 2011, p.11). It is also argued that whilst some bullying may be conscious and rational, serving managerial interests, other examples may be spontaneous responses to particular situations such as a stressful work environment, and as such as may often be counter-productive. Failure to deal effectively with bullying may also at times be

attributable to a need to ‘close ranks’, or to demonstrate managerial loyalties towards perpetrating managers even when such managers clearly are at fault and in breach of organisational rules (Beale and Hoel).

Altogether, whilst conceptually the understanding of the causes of bullying may have evolved positively in recent years, it has been argued that empirical evidence still stems primarily from cross-sectional studies, making it difficult to draw conclusions about cause and effect relationships (Beswick, Gore and Palferman, 2006).

National policies including legal regulation and its effects

Differently from some other European countries such as Sweden and France, the UK has no specific legislation particularly addressing workplace bullying. In this respect successive UK Governments have resisted pressures to introduce such legislation by advocacy groups, including the trade union-sponsored ‘Dignity at Work Bill’ (1996). This Bill intended to provide protection against bullying by introducing employer liability for bullying and similar acts, including “behaviour on more than one occasion which is offensive, abusive, malicious, insulting or intimidating” on a par with what is available to victims of sexual or racial harassment (Yamada, 2011). Whilst it successfully passed through the House of Lords (the upper chamber) in 1996, subsequent attempts to introduce it in the lower House of Parliament failed in 1997 and again in 2001 (Unite, 2007), being effectively blocked by successive Governments, who argued that the current legal remedies suffice (Di Martino, Hoel and Cooper, 2003). It has since been argued that employers and government alike were unhappy with the aspects of the Dignity at Work Bill proposal and it was abandoned at the second attempt (Levinson, 2005 cited in Beale and Hoel, 2010).

With no particular legislation addressing the issue, it has been argued that the legal situation with respect to workplace bullying is ambiguous (Walden and Hoel, 2004) with a range of statutes potentially applicable in cases of bullying (ACAS, 2006). Therefore, when a victim of bullying is pursuing a course of legal action, one or more general legal provisions could form the basis of the case, including among others: Common Law liabilities, health and safety legislation, anti-discrimination legislation or regulations aimed at stalking or the Protection against Harassment Act (Beale and Hoel, 2010; Walden, in press).

With the legal framework being considered weak and indeed ambiguous, the focus has very much been on case law and its development over time (Walden and Hoel 2004). In order to make sense of the courts’ judgement in more recent cases involving bullying and harassment, Walden (in press) examined UK legal practices in respect of the interpretation of employers’ legal duties aimed at protecting “their employees’ psychiatric/psychological health and integrity from work related risks and psychological stressors”. Although historically the establishment of employer’s common law duty of reasonable care for the health and safety of their employees was developed with respect to risk of physical injury and disease, current practice expands this to include psychological/psychiatric injury. Moreover, the employer’s Common Law duty of care is seen to apply to every individual employee as part of their employment contract. Consequently, the employer must take into consideration “not only generally foreseeable risks but also any particular susceptibilities among its employees of which it is aware, or ought to be reasonably aware” (Walden, In press).

Of particular relevance here is the Walker v Northumberland County Council (1995) High Court ruling, in which Walker, an area manager for several teams of social workers within the area of child protection, suffered two consecutive mental breakdowns as a result of high work pressure. Whilst the High Court did not make the employer responsible for the first breakdown, the second one was considered reasonably foreseeable given his first breakdown, and it was argued that insufficient steps were taken to reduce pressures on him. Whilst this court ruling has been considered seminal, it highlights that the court predominantly has accepted a passive or reactive role on the part of the employer, with individual employees still responsible for making the employer aware of any matters of concern or susceptibility, although the exact interpretation of the current legal practices is still contested (Walden, In Press).

Health & Safety legalisation

Another potential avenue available to victims of bullying is through the general statutory provisions contained in the Health and Safety at Work Act 1974, combined with related regulations which would include the Management of Health and Safety at Work Regulations 1999. According to Section 2 of the Health and Safety at Work Act, the employer has a duty of care to ensure, so far as is reasonably practicable, the health safety and welfare at work of their employees. This includes protection from personal injury, described as “any disease and any impairment of a person’s physical or mental condition, which could lead to criminal prosecution by the labour inspectorate” (Health and Safety Executive). It is worth noting that whilst the Health and Safety Act emphasises the need to carry out risk-assessment, this is not supported by a regulatory framework due to remaining uncertainties regarding how to enforce such regulations. (For a further discussion see section on interventions by Governmental agencies below).

Ant-discrimination legislation

With reference to the EU Amsterdam Treaty (1997) and the adoption of the EU’s anti-discrimination Directives, the Equality Act 2010 outlaws employment discrimination and harassment on the basis of sex, race, sexual orientation, religion and beliefs, and age. In addition the Act also outlaws discrimination on the basis of gender reassignment (protection for transsexual employees). Thus Section 26 of the Equality Act 2010 states that:

“1) A person A harasses another (B) if a) A engages in unwanted conduct related to a relevant protected characteristic, and b) the conduct has the purpose or effect of (i) violating B’s dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B. However, to assess whether the conduct has the effect indicated in (1)(b) the following factors need to be considered: a) the perception of B (*in other words the subjective experience of the offended person*)(*my comment*), b) the other circumstances of the case and c) whether it is reasonable for the conduct to have that effect.”

According to the Equality Act 2010, harassment is defined as: “...unwanted conduct related to a relevant protected characteristic, which has the purpose of or effect of violating an individual’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that individual”. Thus, the act cannot be applied to someone who does not come from a protected group or cannot claim protected status.

The Equality Act also covers ‘Third-party harassment’, which refers to experience of members of all protected groups, making the Employer potentially liable for harassment from third parties such as customers. In order for such liability, known as vicarious liability (ACAS, 2006) to come into play, the incident must have happened on at least two occasions, the employer must have been made aware of it and must have failed to take action to stop it.

Finally, the Equality Act 2010 also uses the term Victimisation, referring to cases where a complainant is treated badly in response to a complaint or a grievance or indeed has the intention to file a complaint or take out a grievance. The Act, however, explicitly emphasises that protection from Victimisation does not apply to malicious or false complaints.

Yeboah v London Borough of Hackney may serve as an example where the Equality Act may apply to workplace bullying. In this particular case a West African man (Yeboah) employed by a local council in London was victimised by continuously being subjected to false allegations made by a fellow employee. The court ruled that accusations were not based on any evidence but on an individual’s prejudice and belief that West Africans in general were corrupt (Lewis, Giga & Hoel, 2011).

The Protection from Harassment Act

A further avenue through which claims of workplace bullying have been pursued is the Protection from Harassment Act (PHA) 1997. Although originally introduced as a legal remedy against Personal Stalking and, thus, not particularly intended for the workplace situation, it not only establishes a criminal offence and penalties, but also creates *civil* liabilities by means of a parallel statutory tort enforceable by way of injunction and/or a claim for damages by the victim (including damages for any anxiety and financial loss caused suffered – see section 3 of the Act).

Thus, according to Section 1 of the PHA:

“A person must not pursue a conduct – a) which amounts to harassment of another, and b) which he knows or ought to know amounts to harassment of the other”. Although harassment is not defined in the law, it comprises causing alarm or distress (Walden, in press). Furthermore, for harassment to be seen to have occurred, it must have happened on at least two occasions. It is not necessary to establish any intention on behalf of the harasser with paragraph 2 stating:

“For the purpose of this section, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in the possession of the same information would think the course of conduct amounted to harassment of the other”.

Crucially, the Act (in Section 3) creates applicability of the Protection against Harassment Act within the employment setting. This first became apparent when it was successfully applied to a case of homophobic workplace bullying, thus extending the scope of legal recourse regarding the issue (Walden, in press). In this case - *Majrowski v Guys and St Thomas’ NHS Trust* (House of Lords 2006) - the employer was found vicariously liable for the harassment suffered by an employee (a manager harassed by his line-manager), involving public humiliation, verbal abuse, being given unreasonable deadlines and being ignored. It is striking that under the PHA, the complainant does not need to establish that injury to health has occurred, as anxiety resulting from the harassment is

sufficient (Beale and Hoel, 2010). Moreover, if found liable, employers may have to pay compensation for potential damages.

In this respect, more recent rulings by the courts where the PHA has been invoked have led to very substantial financial compensation to the victim for ‘injured feelings’ and ‘loss of earnings’, with the compensation level approaching £1million. According to Beale and Hoel (2010) this has contributed to keeping the issue ‘in the public eye’. For example, in the case of *Green v DB Group Services (UK) Ltd*, the court found Deutsche Bank Group Services vicariously liable under the PHA and it was obliged to pay its former employee more than £850,000 in compensation in respect of her psychiatric injury for harassment in the form of a sustained campaign of emotional abuse at the hands of some of her colleagues and for lack of intervention from her managers. As argued by Walden (in press), this and other cases send a warning to employers regarding their responsibility where a bullying culture may be present.

The Employment Rights Act 1996

This Act established that employees may not be unfairly dismissed. In this respect, the term ‘constructive dismissal’ refers to situations where an employee is forced to leave their job against their will due to their employer’s conduct. The Employment Rights Act 1996 “enables an employee to claim unfair constructive dismissal if the employer has failed to maintain trust and confidence and has breached their employment contract” (ACAS, 2006). Thus, according to Di Martino et al. (2003), subjecting an employee to workplace bullying could be considered a form of breach of contract.

With respect to bullying, in *Abbey National Plc v Robinson* (2001) an Employment Appeal Tribunal upheld a decision of constructive dismissal where the employee’s manager had subjected the employee to bullying and harassment at a level which was perceived to be insufferable by the employee (Yamada, 2003). Thus, with reference to rulings by Employment Tribunals, Di Martino et al. (2003) concluded: “some court-cases would appear to confirm this orientation, although the jurisprudence has not been consolidated” (p.54). This view was supported by Walden et al. (2004) on the basis of a survey of 5,500 cases brought to appellate Courts and Tribunals, of which 8% of cases involved some element of allegation of bullying and harassment. Based on their study, Walden et al concluded that the legal framework is still weak and unclear, and consequently with a focus on case law.

In conclusion, although the successful application of the Protection against Harassment Act in bullying cases “may have created a *de facto* statutory tort remedy for workplace bullying targets” (Yamada, 2011, 475-75), the law still relies on case-law, making its general trajectory relatively difficult to predict, as much is left to the interpretation of the judiciary and the courts” (Beale and Hoel, 2010, p.105).

Intervention and prevention on the part of companies, trade unions and its effect

Interventions by employer

Although some employers have been slow to come to terms with the fact that bullying represents a serious workplace problem affecting most organisations at some time, nearly all larger employers in the private as well as public sector have now acknowledged the issue. When the problem first came to the fore in the late 1990s as a new workplace issue

of concern to employers and trade unions alike, many organisations rushed to introduce anti-bullying policies as their first and immediate response, with the current tally of bullying policies standing at approximately 75% (CMI, 2008 cited in Harrington, Rayner and Warren, 2012). It is also acknowledged that policies have been the main organisational approach to deal with bullying issues with some organisations never moving beyond this stage altogether.

There appears to be general consensus about what constitutes a good policy framework. For example, in their report for the Dignity at Work Project (BERR, 2008), Rayner and McIvor (2008, p.49) pointed out the following recommended statements:

- articulating (thus demonstrating in writing) the organisation's ownership and opposition to bullying and harassment
- defining bullying and harassment (as closely as possible, with examples) – this might include a code of conduct
- what employees should do informally (including the role of advisers, trade union representatives etc.)
- the role of mediation
- what employees should do formally if no informal solution had been achieved
- the process of complaint

According to the Chartered Institute of Personnel and Development (CIPD, 2005) the world's largest Human Resources (HR) development professional body, the processes of developing a policy need to be led from the top and need to include an examination of other policies which may affect the problem, including policies on reward, job-allocation and grievance. Moreover, as argued by Rayner and Lewis (2011), a bullying policy is about something more than dealing with formal complaints as, in order to be effective, it needs to incorporate statements about how the organisation intends to deal with the problem in terms of prevention and intervention.

Although a policy against bullying is a mechanism to deal with bullying endorsed by employers and trade unions alike, they are frequently seen to fail to fulfil their potential. A common UK problem seems to be that the policy is not properly communicated to the organisation's membership or embedded in other organisational processes such as induction and training of staff. Launching a policy without having the necessary mechanism in place, including training of managers, can even be considered counter-productive (Rayner and Lewis, 2011).

According to the CIPD, (2005), which has played a central part in shaping UK employers' knowledge and attitudes about the problem, employers' primary responsibility in this area is to develop and communicate the organisation's commitment to dignity and respect at work and steer the entire workforce's responsibility towards this goal. To achieve this goal line-managers' responsibility in pointing out and correcting bullying and intimidating behaviour is emphasised. In addition the organisation should provide targets with advice and support, including pointing out their options and supporting them within the process, as well offering support and counselling, where necessary. (For a discussion on employee support and rehabilitation, see Tehrani 2011).

In order to take the issue forward the CIPD in 2005 produced a report entitled "Beyond policies: towards a culture of respect". The approach promoted in this report focuses on cultural change with the aim of establishing organisations where employees are treated with dignity and respect, which would require a clear vision on the part of

employers in terms of what such a culture entails, including continuous assessment of progress, development of monitoring tools and a commitment to maintain momentum (CIPD, 2005). In line with such a view it is striking that many UK organisations now refer to a ‘dignity at work policy’, rather than to a bullying policy. It is also of interest that the CIPD, as the professional organisation of human resources practitioners, acknowledges that line-managers are the most likely sources and perpetrators of bullying. To explain why this is the case it is suggested that bullying by managers largely reflects a tendency to promote people to managerial positions without ensuring that they have the necessary skills to manage people. Failure to deal with and manage change processes is seen as a particular problem with accusations of bullying often emerging in the wake of such organisational change processes. In response it is argued that such processes need to be carried out in a fair manner by what is referred to as ‘strong management’ (CIPD, 2005).

In addition to a statement by the employer that bullying is unacceptable and constitutes a disciplinary offence, a common element in bullying policies is a commitment that any complaints of bullying will be investigated speedily and fairly in line with the organisation’s formal procedures (see Hoel and Einarsen, 2011 for a discussion). However, in this respect there is some doubt about the extent to which UK employers actually follow their own policies. According to Harrington et al. (2012) a lack of trust in Human Resources (HR) as being able and willing to enact the policy in a fair manner appears to be a common argument by targets for not filing a complaint (e.g. UNISON, 2009). Based on evidence from interviews with a number of HR managers Harrington et al. (2012) concluded that there exists a widespread belief among HR managers that accusations of bullying were generally unfounded and rather reflected a performance-management issue with the complainant as the likely guilty party. Furthermore, HR’s primary concern appears to lie with the interest of the organisation and many practitioners dreaded the response of line-managers when issues of concern were brought to their attention. Interestingly, many HR managers avoided the bullying label altogether, preferring to describe the behaviour of perpetrators as incompetent and inappropriate, rather than bullying, and blaming the employees for excessive use of the bullying label (Harrington et al., 2012).

In the last few years there has been an increased emphasis in the UK on early dispute resolution and mediation. Based on the Gibbons Report (Gibbons, 2007) and incorporated in the 2008 Employment Act, it has been argued that this provides the employer with an alternative tool to address the issue of workplace bullying at an early stage (Beale and Hoel, 2010). Whilst the uptake and the effectiveness of such an approach is still uncertain, one should bear in mind the warning by Keashly and Nowell (2011) about the inappropriateness of applying mediation in severe cases of bullying where the targets have difficulty in defending and standing up for themselves and where mediation could be manipulated to serve the interest of the perpetrator. Beale and Hoel (2010) also argue that a mediation approach may be better suited to deal with cases of bullying between colleagues compared to the more frequent cases involving bullying by managers of subordinates.

Interventions by Governmental Agencies

The UK Health and Safety Executive (HSE), the public body responsible for the encouragement, regulation and enforcement for health, safety and welfare, has in recent years pursued a risk-assessment approach to the control and management of workplace stress. The approach, albeit not legally enforceable, is meant to assist employer action. Due

to continuing uncertainty with respect to the effects of the approach, the prospect of introducing statutory regulation in this field has been precluded (Mackay et al., 2004). To ensure progress in the area of stress management, HSE has relied on introducing 'standards' as a management tool, a well known approach applied within other areas of health and safety control management systems. To develop its framework the HSE has followed Cox's (1993) well-known taxonomy of stressors, identifying seven classes of workplace stressors, one of which, 'relationships', is seen to be strongly associated with workplace bullying.

The HSE's risk-assessment framework on workplace stress is intended to assist the employer in reducing the likelihood of a workplace hazard that will lead to harm, where the hazard here refers to features of the workplace which have the potential to cause harm (i.e. relationships at work). According to Mackay et al. (2004) a risk-assessment approach, one that is widely used internationally for physical hazards, is based on a view that collective protective measures are given priority over individual ones. Furthermore, whilst the organisation's targets are identified by experts and communicated to the workforce (top-down), the identification of any discrepancy between current and desired states is based on feedback from the workforce (bottom-up). Thus, in order to assist the management of the standards, for each class of psycho-social stressor a set of corresponding indicators of achieving the standards has been developed. These indicators represent a series of questions (or statements), with the aim "to capture the workforce perceptions of the situation (Mackay et al., 2004, p.103). The promoted target of a threshold of 85% of the desired state is based on previous research suggesting that 20% of the workforce suffered from severe levels of stress, which *de facto* would mean a net reduction in stress by 5% in the first instance (Smith et al., 2000). The cut-off point of 85%, therefore, refers to the share of the workforce agreeing that the standards have actually been met.

It is important to state that in terms of workplace bullying this approach is still in its infancy. Thus, whilst evidence for applicability and success of the approach with respect to stress reduction is emerging for several other psycho-social stressors, little by way of evidence has so far come about for 'relationship' stressors.

Only a couple of studies have been undertaken to assess the effectiveness of employer interventions (e.g. Carer et al. 2011). In one such study, Hoel and Giga (2006) compared the effectiveness of three interventions within five large public sector organisations: 1) communication of bullying policies; 2) awareness of workplace bullying and its effects; and 3) stress management. In order to assess the effectiveness of these interventions they were applied in various combinations across the five participating organisations. Despite a rigorous research process, the researchers were unable to identify any clear pattern between any intervention/combinations of interventions, on the one hand, and positive outcomes in terms of reduced negative behaviour and bullying and improvement in individual outcomes (e.g. psychological contract and job-satisfaction) or organisational outcomes (e.g. absenteeism and turn-over rates), on the other.

Documentation of individual UK employers' approach to bullying is similarly scarce. In one such rare study of a 200-strong employee public sector organisation, Pate, Morgan-Thomas and Beaumont (2012), senior management admitted failure to previously acknowledge bullying and act on it despite the presence of a bullying-policy. By means of what is referred to as a robust approach, in which several senior managers were dismissed as a result of being found guilty of bullying, employee perception of bullying was

significantly reduced. However, according to the researchers restoration of trust in management was only partially achieved.

Trade union response

It is noteworthy, albeit not surprising, that it was the trade unions rather than the employers who first raised the issue of workplace bullying on their agendas. In this respect, some trade unions, such as the Manufacturing, Science and Finance Union (MSF), now an integrated part of Unite the Union, the largest British trade union, were among the prime movers behind the Dignity at Work Bill. Since the late 1990s most UK trade unions as well as the Trades Union Congress (TUC) have moved the issue high up on their agenda, offering training to shop stewards and members, developed and published guidelines on how to deal with the problem (see Di Martino, Hoel & Cooper, 2003), commissioned research reports, e.g. on the cost of bullying (Giga et al., 2008a), as well as giving their backing to various anti-bullying campaigns.

Development and implementation of anti-bullying policies has been a key focus for trade union demands regarding workplace bullying since the late 1990s as it is seen to legitimise complaints about bullying from employees as well as serving as a focal point for an organisation's strategy against bullying. Such a view is clearly expressed in this statement by two national trade union officers: "A policy makes a clear statement about what an organisation thinks, its relationship with staff and how it expects people to work within its culture" (Richards & Daley, 2003, p.247).

Furthermore, in order to push the issue up the organisational agenda, and to provide evidence and ammunition for action on the issue, many trade unions have carried out their own surveys of bullying. Among the largest and most extensive surveys are several undertaken by the largest public sector union UNISON, the results of which have been reported above. In addition to providing evidence for the extent of the problem and identification of risk-groups, it has provided important feedback with respect to the memberships' general attitudes towards bullying and their beliefs about its causes (UNISON 1997; 2008): "Bullies were able to get away with it" and "workers too scared to report it," both statements being endorsed by more than 90% of respondents. Although scientifically these findings may be questionable in terms of establishing the real causes of bullying, they reflect employees' lack of trust in the effectiveness of internal processes associated with bullying and the employers' handling of these as indicated previously.

In 2004, the Government Department of Trade and Industry (DTI, now Business, Enterprise and Regulatory Reform - BERR), funded a joint trade union and employer-led initiative, the *Dignity at Work Partnership* project, at a cost of £1.3M (BERR 2008). Spearheaded by the trade-union Amicus (now Unite the Union), it was joined by several large employers such as British Airways, British Telecom and Royal Mail, among others. A key aim of the project was to develop strategies to tackle bullying. Following interviews and focus groups undertaken with a number of stakeholders by independent researchers, it was concluded that a successful approach against bullying would have to be build on commitment from the top combined with buy-in from the entire workforce. In line with this, whilst the need for policies was highlighted, it was emphasised that policies alone could not guarantee a harassment-free work-environment, with employee involvement (voice) considered a key to creating joint ownership of the problem both with respect to problem identification/understanding and solution. Among other issues highlighted were the need for training in problem recognition and the need to establish a zero-tolerance for

bullying. Finally, the need for a joint partnership was emphasised: “Tackling bullying and harassment in the workplace requires a partnership based on trust and delivered through a shared zero-tolerance culture valuing people as individuals” (Rayner & McIvor, 2008). It is also of interest that the project emphasised the experience of minority workers, including disabled employees, lesbians, gay men, bisexuals and transgender (LGBT) as well ethnic minorities. In respect of ethnic minorities, a specific review was commissioned to gauge Black and Ethnic minorities’ (BME) experience of workplace bullying (Giga, Hoel and Lewis, 2008b).

Despite investment in such joint processes there is doubt about their uptake and effectiveness. For example, in a recent study of trade union members’ responses to bullying, Mawdsley (2012) found that most would prefer what she referred to as ‘target focus solution’, i.e. taking sick-leave or changing jobs to ‘punitive perpetrator solutions’ such as filing a formal complaint or taking out a grievance due to an overall dissatisfaction about how these were resolved and their ability to provide targets with redress. These findings seem to corroborate Harrington et al.’s, (2012) findings, with processes seen as lengthy and biased in favour of managers.

Role and functioning of voluntary organisations

Since interest in the issue of bullying emerged in the early 1990s, voluntary and charitable organisations have played a significant role in spreading information about the problem as well as providing support for victims. In this respect, it has been argued that the activity and determination of articulate victims contributed very significantly to the public debate and early interest in the issue. By exercising continuous pressure on the media in the broadest sense and by numerous innovative initiatives utilising conference appearances, written publications and the internet, these activists contributed to informing and educating the public and effectively prevented the issue from disappearing from public view). Among such victim voices, no-one had more impact in the UK than Tim Field who set up the Workplace Bullying Advice Line and the Success Unlimited Website. Although often considered controversial in his argumentation and rhetoric by academics, his best-selling book “Bully in sight - How to predict, resist, challenge and combat workplace bullying?”, was very well received by victims of bullying and for a time played a significant role in the public debate.

Whilst Field and other victim-initiated support groups particularly functioned as a point of support for victims, other charitable organisations targeted politicians and policy makers. One of the most influential of this kind was the Suzy Lamplugh Trust, which since 1988 has campaigned on various issues on personal safety, violence and aggression, including stalking and workplace bullying.

In 1997 after the early death of Andrea Adams, the Andrea Adams Trust was set up to ensure that her compassionate work continued. The Trust aimed to raise awareness of the bullying issue and to provide aid and support to individuals as well as organisations (The Andrea Adams Trust, 1998). Although it became the leading campaigning charity on workplace bullying, running a very successful helpline for a number of years, and institutionalising a particular ‘Ban bullying at work day’ which received considerable attention in the media (7 November), it had to close down its charitable operation in 2009 due to lack of funding, reducing its focus to training and consultancy activities (<http://www.andreaadamsconsultancy.com/about>).

In addition to the telephone help-lines operated by some trade unions (see above) provision of help-lines for victims of bullying has been a stable and welcome activity of many of the charities operating in this field. Beside the help-line operated by the Andrea Adams trust, the National Anti-bullying Helpline has been one of the most prolific. Unfortunately, the leader of the organisation became embroiled in a political row over an accusation of bullying by the previous British Prime Minister (Gordon Brown) which impacted negatively on the organisation's standing and perceived professionalism (<http://www.standard.co.uk/news/antibullying-helpline-in-downing-street-row-suspended-with-chief-exec-ready-to-resign-6759398.html>).

A number of anti-bullying charities, including Dignity at Work Now (DAWN), have spent much of their activity campaigning for a Dignity at Work Act (see above) and supported various initiatives, including academic studies on the issue of workplace bullying.

From an academic and a political point of view, some of the arguments advanced and stands taken on particular issues by some of these charitable organisations and their leaders have been unwelcome and considered counter-productive. In particular, the attempts to portray bullies as psychopaths or sociopaths (Field, 1996) was for a time seen as undermining the opportunity to have a constructive debate with employers about organisational responses to the problem, particularly given the apparently high number of managers among UK bullies. Whilst for a time this argument seemed to find a resonance with the general public, and, in particular with victims of bullying, the argument gradually faded, and no longer forms an important part of the public discourse.

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Workplace Bullying and Harassment in Germany*

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Workplace bullying has engaged Germany for 20 years now. The discussion about this phenomenon was primarily initiated by a book written by Heinz Leymann and published in 1993: “Mobbing. Psychoterror am Arbeitsplatz und wie man sich dagegen wehren kann” (Bullying. Psychoterror in the workplace and how you can defend yourself against it). Since the publication of this book a lot has happened in Germany. Nevertheless, the summary is only from meagre to moderate. In many companies bullying is still a word that is not talked about. Other companies, on the other hand, have responded to the challenges and are following the way of best practice. Overall successes are rather anecdotal, all in all, the balance is rather sobering. German legislature has so far failed to confront the bullying problem. Those looking for clear legislation in Germany, won't find it there.

Harassment is a different case: The Grundgesetz, the German Constitution, the basic law for the Federal Republic of Germany is clear about this. According to Article 2 Section 1 (Art. 2 Abs. 1 Grundgesetz [GG]) it states, that everyone has the right to free development of his personality insofar as he does not infringe on the rights of others and does not violate the constitutional order or the moral law. Further, it says in article 3 section 3 (Art. 3 Abs. 3): No one may be prejudiced or favoured because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No one may be discriminated because of his disability.

As a result of the implementation of European law provisions into national law on 18.08.2006, the Allgemeines Gleichbehandlungsgesetz (AGG [general equal treatment act])¹ has come into force. This act aims to prevent or remedy discrimination on grounds of race or ethnic origin, gender, religion or philosophy of life, disability, age or sexual identity (paragraph 1 [§ 1] AGG). Paragraph 7 section 1 (§ 7 Abs. 1) AGG states a ban on discrimination: Employees should not be disadvantaged because of a reason referred to in paragraph 1 (§ 1) AGG. Further, paragraph 7 section 3 (§ 7 Abs. 3) AGG clarifies that a discrimination according to paragraph 7 section 1 (§ 7 Abs. 1) AGG, carried out by the employer or an employee or several employees, is a breach of contractual obligations within a contract of employment, which is accessible to sanction. In accordance with paragraph 12 section 3 (§ 12 Abs. 3) AGG, the employer shall take measures necessary to eliminate discrimination appropriate to the individual circumstances (for example warning, repositioning, relocation or dismissal) when employees are in breach of the discrimination

* I thank Elke Clauberg-Sheehy for translation the paper into English.

¹ www.gesetze-im-internet.de/agg

prohibition under paragraph 7 section 1 (§ 7 Abs. 1) AGG. Furthermore, paragraph 15 (§ 15) AGG grants the person discriminated against compensation and damages.

Of particular relevance is paragraph 13 section 1 (§ 13 Abs. 1) AGG, which requires that every employer has to set up a specific complaints body to which those employees can turn, who feel discriminated against by their employer, supervisor, other employee or third parties (for example agency or temporary workers, customers) because of a reason referred to in paragraph 1 (§ 1) AGG (= race, ethnic origin, gender, religion, philosophy of life, disability, age, sexual identity). I will return to the special significance of this body, which is known as “betriebliche Beschwerdestelle” (company complaints board), in item VIII. (Intervention and prevention in companies).

The Allgemeines Gleichbehandlungsgesetz (general equal treatment act) defines in its paragraph 3 section 1 (§ 3 Abs. 1) direct and in paragraph 3 section 2 (§ 3 Abs. 2) indirect discrimination. Further, it tells us the conditions under which a harassment (paragraph 3 section 3 [§ 3 Abs. 3]) or sexual harassment (paragraph 3 section 4 [§ 3 Abs. 4]) represent discrimination in terms of the general equal treatment act. I will have a closer look at the importance of the expression of harassment for addressing the bullying issue in item VII. (Importance of the judiciary).

I. Definition and demarcation of other expressions

There is no single definition of what exactly is meant by workplace bullying in Germany. Also, there is no statutory legal definition.

Workplace bullying can roughly be described as “workplace psychological terror” because with this description much is expressed by what constitutes the workplace bullying: a steadily over a long period of time developing process with many diverse activities, which can make those affected sick and can cost them their professional and private life. And because it is precisely these aspects that make up the bullying phenomenon, they are inevitably included in the various definitions. For this reason alone I would like to confine myself to the notion of a definition that includes both academic and occupational aspects of labour law, while ensuring that it is distinguished from other concepts.

Definition of Esser and Wolmerath²

Bullying is a process happening in the working environment, where destructive actions of various kinds against individuals are made repeatedly and over a longer period and are perceived by the aggrieved party as an infringement and violation of their person and

where the unbridled course for those concerned basically leads to the fact that their psychological state and health are increasingly impaired, their isolation and exclusion in the workplace increase, however, the opportunities to a satisfactory solution dwindle and frequently end in the loss of their work sphere.

The bullying phenomenon is merely a manifestation of psychosocial pressure in the workplace, even if the associated risks for those affected can still be so grave. Psychosocial pressures are those, which arise from the social interactions of people in their workplace

² Esser/Wolmerath, *Mobbing und psychische Gewalt. Der Ratgeber für Betroffene und ihre Interessenvertretung*, 8. Auflage (eighth edition), Frankfurt am Main 2011, page 25.

and have an adverse effect on the mental well-being of those working there. Therefore, you could also call it psychological harassment in the workplace. As further manifestations especially the (sexual) harassment and discrimination are mentioned.

In generalised form harassment has been defined in paragraph 3 section 3 (§ 3 Abs. 3) AGG. Accordingly, somebody harasses someone when unwanted intentional or unintentional conduct violates the dignity of the other person and an offensive environment that is marked by intimidation, hostilities, degradation and humiliation is created.

Similarly, according to paragraph 3 section 4 (§ 3 Abs. 4) AGG, sexual harassment exists if unwanted sexually defined behaviour, including unwanted sexual acts such as certain sexual physical contact, comments of a sexual nature and unwanted showing and visible exhibition of pornographic images where the purpose or effect is the violation of a person's dignity, especially when an offensive environment that is marked by intimidation, hostilities, degradation and humiliation is created.

For the definition of discrimination we can fall back on paragraph 75 section 1 Betriebsverfassungsgesetz (works council act [§ 75 Abs. 1 BetrVG]), even if the provision made therein refers to the commitment of the employer and the works council. Accordingly, those discriminate, who treat another contrary to the principles of law and equity, particularly those based on race or ethnic origin, ancestry or other origin, nationality, religion or philosophy of life, disability, age, political or trade union activities or views, or because of gender or sexual identity.

Another manifestation of psychosocial stress is *Nachstellung* (stalking), pursuant to paragraph 238 of the penal code (§ 238 StGB [Strafgesetzbuch]), which provides for the imposition of a penalty of imprisonment or a fine. Even though this criminal regulation does not focus on the working world, it has its application there, if the stalking takes place in the work place. In August 2012 a 43 year old worker made the German media headlines when a former work colleague made his life a proverbial hell with, among other things, text messages, phone calls, a death threat and a fake death notice in a widespread newspaper. The stalker was perhaps caught so quickly because he had given his personal details when he placed the obituary in the paper.

All forms of psychosocial stress at work are interwoven by a circumstance, have one thing in common. They can occur as a single act, only carried out once or as a dependent part of the bullying act. Therefore, it does not come as a surprise that up to 5 % of all bullying cases in Germany are attributed to the area of sexual harassment.³

II. Current situation

In describing the current situation in Germany, I will limit myself to the problem of workplace bullying, which is not necessarily easy. This is partly due to the fact that there are only a few significant studies. Moreover, the present findings are often quite old now. Therefore, they do not necessarily reflect the current situation in the German working world at the beginning of 2013.

1. Spread

Nobody knows how many people are actually affected by bullying in Germany. The figures based on calculations and estimate figures vary considerably. If we agree on an

³ Wolmerath, *Mobbing. Rechtshandbuch für die Praxis*, 4. Auflage (fourth edition) Baden-Baden 2013, page 30.

average value, the number is about 1.3 million.⁴ This assumption is supported by a study published in late 2011,⁵ where a figure of 3.5% of total employment is considered. This means that with around 40 million employees in Germany approximately 1.4 million people would be exposed bullying. If we further consider, that there are approximately 3.6 million businesses in Germany, then inevitably it becomes clear that bullying can be found in almost every other company.⁶

Based on the entire working life of an employee numbers show that every fourth to ninth working person in the course of their careers are at least once faced with a bullying situation.⁷

2. Company sizes, sectors and employee groups

Bullying can be found in every business. This applies in the same way in private sector as the public sector. There is evidence that in small and medium sized private companies with up to 249 employees are far more cases of bullying than in large companies with a workforce of 250 or more. This can be explained by the fact that in large firms established occupational safety and participation structures are in place, rather than with small and midsize businesses.⁸

At the start of substantive examination of the bullying problem in the working world, the attention was focused on the clerical workers and civil servants. Blue-collar workers seemed to be spared from bullying. They were added later as an affected group of people due to changed working conditions and organizational structures. Today, the phenomenon of bullying affects all groups of employees, albeit in different and ever-changing dimension. If there was a decrease for civil servants to be exposed to the risk of bullying and an increase for blue-collar workers at the end of 2000,⁹ the trend about 10 years later was exactly the opposite.¹⁰

What has barely changed in these ten years, are the industries and occupations in which there is an increased risk of being confronted with bullying. Those who work in the field of private sector services, the public service and trade, carry a significantly higher risk of bullying than somebody employed as a craftsman.¹¹

3. Gender, age and duration of employment

Some studies suggest that women in particular are affected by bullying. Apparently, about $\frac{2}{3}$ to $\frac{3}{4}$ of all bullying cases happen to women, and the rest (= $\frac{1}{3}$ to $\frac{1}{4}$) are men.¹² Whether these findings reflect the real situation is uncertain. There are two arguments against it: Firstly, women in comparison to men are more willing to take advice and support assistance, on the other hand, many women work in industrial sectors where

⁴ Wolmerath (footnote 3), page 35.

⁵ Eisermann/de Costanzo, Die Erfassung von Mobbing – Eine Konstruktvalidierung aktueller Datenerhebungsverfahren, Dortmund/Berlin/Dresden 2011.

⁶ Wolmerath (footnote 3), page 35.

⁷ Wolmerath (footnote 3), page 35.

⁸ Saßmannshausen/Wessels/Deilmann, Mobbing – Zahlen, Daten und Fakten, in: Wolmerath/Esner, Werkbuch Mobbing. Offensive Methoden gegen psychische Gewalt am Arbeitsplatz, Frankfurt am Main 2012, page 30.

⁹ Meschkutat/Stackelbeck/Langenhoff, Der Mobbing-Report. Repräsentativstudie für die Bundesrepublik Deutschland, Dortmund/Berlin 2002, page 37.

¹⁰ Saßmannshausen/Wessels/Deilmann (footnote 8), page 31.

¹¹ Meschkutat/Stackelbeck/Langenhoff (footnote 9), page 31; Saßmannshausen/Wessels/Deilmann (footnote 8), page 28.

¹² Wolmerath (footnote 3), page 36.

bullying is more common. There are also fewer women employed in higher professional positions.¹³

In companies, no age group is spared by bullying. In 2012 Saßmannshausen/Wessels/Deilmann¹⁴ reported a higher than average concern among 30 – 49 year olds, in the age groups under 30 and 50 (and over) the numbers were below average. Ten years earlier, according to the findings of Meschkutat/Stackelbeck/Langenhoff¹⁵ these figures were reversed. They had then found the strongest concern with the under 25s and the second strongest vulnerability in the age group 55 and older.

With regard to the duration of employment Zapf¹⁶ stated in the late 1990s, that there is an increased risk of harassment in connection with the arrival of a new job. According to his findings, this is especially the case if from the outset a particular department or work group was against the filling of a position with a particular person; or a person from within a work group had unsuccessfully hoped to fill a vacant position. For about 33% of bullying victims bullying started within the first six months in the new job, for 6 % within the first three months. 12% stated that they have been exposed to bullying from the outset.

Whoever concludes from this result that a long-term employment with the same employer protects against bullying, will be shown differently by Zapf.¹⁷ 26% of bullying victims interviewed by him reported to have been more than five years in their workplace before the bullying began.

4. Persons concerned and persons involved

In the 1990s bullying by superiors seemed to be in the foreground. Around 75% of cases were attributed to this group of people.¹⁸ Taking into account the fact that bullying also exists among the managers, 30% of the cases were attributed to the same level (supervisors ./ supervisors; subordinates ./ subordinates).¹⁹

In 2001 Meschkutat/Stackelbeck/Langenhoff²⁰ noticed a shift. In 51% of cases were due to bullying by superiors or happened with their participation, while in 55.2% of cases work colleagues were involved in bullying incidents. Saßmannshausen/Wessels/Deilmann²¹ reported a new shift in 2012. Then 57.7% of all acts of harassment were carried out by superiors, while 30% were carried out by colleagues. The reasons for the observed shifts are more likely to result from the prevailing economic conditions than to a change of leadership within the companies.

Looking at the past 13 years, in more or less half of all cases bullying is carried out by superiors. The other half would affect a bullying at the same level. Only in very rare cases (1.5 %²² – 2.3 %²³) superiors will be exposed to bullying by their subordinates.

¹³ Wolmerath (footnote 3), page 36; Saßmannshausen/Wessels/Deilmann (footnote 8), page 26.

¹⁴ (footnote 8), page 28.

¹⁵ (footnote 9), page 27.

¹⁶ Zapf, Mobbing in Organisationen – Überblick zum Stand der Forschung, in: Zeitschrift für Arbeits- und Organisationspsychologie, Heft 1/1999, page 4.

¹⁷ (footnote 16), page 4.

¹⁸ Wolmerath (footnote 3), page 38.

¹⁹ Metzner, Mobbingfälle. Bericht und Auswertung der Angaben der Betroffenen aus zwei Jahren Arbeit der Beratungsstelle "No Mobbing" in Berlin, Herausgeber: Deutscher Gewerkschaftsbund, Informationen zur Angestelltenpolitik 01/98, page 7.

²⁰ (footnote 9), page 65.

²¹ (footnote 8), page 33.

²² Metzner (footnote 19), page 7.

²³ Meschkutat/Stackelbeck/Langenhoff (footnote 9), page 66.

The number of participants in a specific bullying situation depends heavily on the party against whom the attacks or acts are directed. If it involves a subordinate, basically a single person is enough to make their life a proverbial hell. It is mostly the superiors who have the authority to take action against a subordinate. The same applies to supervisors and co-workers who can both individually and combined bully one person who is hierarchically equal to them. With bullying from the bottom up, however, the situation is completely different. It usually requires the interaction of several subordinates in order to crowd out a superior from his professional position.

Target of bullying, however, are only individual people, even if several members of a department can be affected by bullying at the same time. In such a situation a number of people are exposed to individual bullying situations in parallel.

Excluded is the bullying of a group. Ultimately, its members can give each other assistance and social support. In addition, there would be a risk for the bully that members of the group form an alliance and turn the tide, say pushing the perpetrator into a victim role.

5. The role of the “Möglichmacher” (Facilitator)

Heinz Leymann has coined the term “Möglichmacher”²⁴ (facilitator). So called are persons who are watching, do not worry about the bullying situation, let the process continue, and look away. If these people intervened in the course of events, the bullying would usually stop quite fast.

Because the “Möglichmacher” (facilitator) allows the bullying, on the one hand, they contribute to a progressive isolation of bullying victims, on the other hand is their behaviour often seen as a sign of solidarity by the bully. Consequently, it can give the impression as if there is an internal consensus so that the bully thinks: “The staff is behind me and my actions” and the one affected by bullying assumes: “They are all against me”. Unfortunately, in a number of cases, such a consensus actually exists.²⁵

Possible “Möglichmacher” (facilitators) are all persons are concerned, which are in contact with the bullying victim. Depending on the work of those people this may include managers, supervisors, co-workers, works council members and contract workers employed in the company and employees of service providers (for example canteen staff, cleaners). If you look at the private life of the person concerned, especially friends, neighbours, family, and the life partner or spouse should be mentioned.

Of particular importance in this context are superiors. They are repeatedly accused of leadership failure in connection with bullying situations that occur, and therefore they carry a certain (joint) blame. In many cases, this accusation is more than justified. At the time of recruitment and promotion of superiors more attention is paid to vocational qualifications and skills rather than their social skills. Many superiors look the other way, feel overwhelmed and allow the bullying free reign, rather than calling on the assistance of other persons and by citing their rights to give instruction without the need for an explanation or justification they could take advantage of their leading position in the company and have clearing talks or moderate discussions and separate the conflicted parties.

²⁴ Leymann, *Mobbing. Psychoterror am Arbeitsplatz und wie man sich dagegen wehren kann*, Reinbek bei Hamburg 1993, page 61.

²⁵ Wolmerath (footnote 3), page 48.

6. Variety of bullying acts

The past 20 years have shown that because of the diversity of the possible actions by the bully, there are no limits. The more intelligent the bully is and the more clandestine and clever he is, the more difficult it will be to attribute actions to him.

Any attempt to make a complete list of possible bullying actions has so far failed. Despite those findings, it is the verbal actions that are in the foreground.²⁶ The reason for this is obvious. On the one hand this can usually be not or extremely difficult to prove, on the other hand the threshold for their perpetration many times lower than it is the case with non-verbal actions. Further, the bully's verbal actions can be easily put into perspective and transfer the responsibility for what happened to the victim. Phrases like "you must have misunderstood me" and "I did not say it that way" are more than capable of invalidating verbal attacks and to clarify to the attacked: "If you had listened to me properly, then you would have understood me correctly."

It is noted again and again, that superiors are misusing their authority to commit acts of bullying.²⁷ Ruberg calls this aptly "schikanöse Weisungen" (instruction to harassment).²⁸

While the Internet is mainly used by young people to commit acts of bullying (so-called cyber-bullying), in the work place it seems to be of minor importance at the moment. Perhaps this is because the users of Facebook & Co. are still relatively young and often just beginning their careers. In addition, the company offers plenty of opportunities to commit acts of bullying. Use of the internet is not required so far.

III. Consequences

Bullying has a variety of implications and risks, which are not limited to the bullying victims. Further mentioned in that regard are:

- the bully,
- the employees in the company concerned,
- the company concerned,
- the society.

1. The person affected by bullying

Without a doubt suffered bullying makes sick – at least in the longer term. Stress resulting from bullying negatively affects the wellbeing and the health of the person concerned. Possible results are: insomnia, reduction of self-esteem, heart and circulatory disorders, head and neck pain, gastrointestinal disorders and depression. In addition to the risk of serious psychological and psychosomatic (and resulting in physical) illness is a risk of abuse of drugs and alcohol. Even suicide or suicide attempt is possible. It is estimated that about 20 % of suicide cases in Germany have suffered bullying. This would amount to about 2,000 cases per year, with about 1,500 suicides in men and around 500 suicides in women.²⁹

²⁶ Meschkutat/Stackelbeck/Lagenhoff (footnote 9), page 42 also Saßmannshausen/Wessels/Deilmann (footnote 8), page 34.

²⁷ Wolmerath (footnote 3), page 35.

²⁸ Ruberg, Schikanöse Weisungen. Psychosoziale Gefährdung am Arbeitsplatz im Blickfeld der Gerichte für Arbeitssachen – nicht nur! – bei "Mobbing", Münster 2004.

²⁹ Wolmerath (footnote 3), page 44.

From a professional view, bullying may also have far-reaching consequences: In addition to the withdrawal of a particular position or transfer to another job is the loss of employment. As the only option to get away from the bullying, many victims only see a solution by leaving their jobs or even their employment – and not only a few in suicide. If no new work is found, the trip to the “Agentur für Arbeit” (employment agency) is inevitable in order to receive unemployment benefits. How long it takes bullying victims, until they find a new job, is not known.

2. The bully

In Germany, we know very little about the bully. The potential impact and consequences of his actions are manageable. The focus is on legal sanctions, even if they are more of a theoretical nature. Bullies who act in secret, or where their actions can not be ascribed to them, hardly have expect sanctions for their behaviour.

Health risks are unlikely in the same way. It is different for the “Angst-Mobber” (fear-bully), who acts according to the principle: “Attack is the best defence” or “rather bullying than being bullied.” For him, the bullying is associated with significant stress, he suffers and gets sick in a similar way as in the case of bullying victims.³⁰

3. The company and its employees

Today there is no longer a doubt about it that bullying has a negative impact on the working environment and the work morale. The loss of motivation among employees is associated with deterioration in the quantity and quality of work, which would usually lead to an increase in costs. This in turn can have an impact on the competitiveness of the company and, at worst, threaten its survival.

It is estimated that the non-productive time of bullying victims and the underperformance of bullies together with the loss of working time because superiors and human resources departments need to deal with the bullying case, amount to a cost of about €15,000 up to €50,000 a year. The costs arising from the resignation of an employee are estimated between €7,500 (for a warehouse worker) and approximately €20,000 (for a manager with an annual salary in the amount of approximately €60,000). It is thought that absenteeism caused by bullying amounts to costs of around € 15 billion a year. This figure refers only to the business costs.³¹

4. The Society

Finally, the society itself suffers from bullying. As some of the implications and consequences mentioned are the loss of social values and an increasing decay in interpersonal skills. The ability and willingness to engage in open, fair and constructive resolution of conflicts decreases in the same way as mutual respect and solidarity is lost. The loss of social skills and verbal communication is offset by the increase in verbal and non-verbal violence.³²

The cost to society caused by bullying is not known. According to estimates from the 1990s the treatment cost for bullying cases was between € 50,000 and € 65,000 per patient. The total economic costs of all absence due to illness were estimated to be around € 2.5 billion a year for every 1 % of sick leave, which referred only to the calculation of the “old”

³⁰ Wolmerath (footnote 3), page 45.

³¹ Wolmerath (footnote 3), page 46.

³² Wolmerath (footnote 3), page 47.

federal states. The estimated costs to the statutory pension because of early retirement due to bullying were 1.5 to 3 billion €, which was calculated on 12,000 to 25,000 premature retirements per annum.

IV. Background and reasons

The reasons for the bullying of a particular person are highly individualized and based on the specific case. They range from envy and resentment over poor conflict resolution skills and the fear of losing one's own job to strategically planned job cuts by the employer. On top of that bullying is a form of conflict resolution, which follows the point of view: "You are the problem – when you're gone, the problem is solved."³³

In each specific case the bullying can have several reasons, which does not make the situation easier for the bullying victims. Also, one should be aware that some of the motifs are influenced by the current economic situation of the company. Bullying among employees or superiors is more in the interest of the employer when the company in a tense economic situation, rather than in times of full order books and staff shortages. It might even be profitable for an employer if employees are reduced by means of bullying.

In the late 1990s Zapf³⁴ and Gleichmann³⁵ independently from each other created a catalogue of possible causes which give their synopsis of a very extensive and reliable overview of the possible causes of bullying. In spite of different expressions both have arrived at similar results.

Possible causes of bullying³⁶

(1) Causes in the environment

- Under or over challenge in the workplace
- Poor working environment, social norms
- Lack of work organization
- Error in leadership behaviour
- Unclear authority rules
- External working conditions
- Fear of job loss

(2) Causes in the social system

- Social composition of the group
- Hostility, resentment
- Envy
- Peer pressure
- Scapegoat Syndrome

(3) Causes in the personal system

- Ethical standard
- Balanced personality
- Possibility of stigmatisation
- Qualification
- Social Skills

³³ Wolmerath (footnote 3), page 29.

³⁴ (footnote 16), page 12.

³⁵ Gleichmann, Mobbing – Psychoterror am Arbeitsplatz. Schulleitung und Schulentwicklung, Stuttgart 1997, page 3.

³⁶ Wolmerath (footnote 3), page 41.

(4) Causes in the person of the bully

- Coping and self-esteem problems
- Sociopathic personality
- Personal goals and motives
- Possible fears

(5) Causes in the person of bullying victims

- Few social skills
- Performance issues
- Sociopathic personality
- Distinctive outer appearance
- Diseases/illnesses

V. Current legislation

As I already mentioned earlier, there is no specific legislation on bullying issues in Germany. For this reason, the general statutory provisions for the legal processing of bullying must be used. This is in part quite a chore, but is facilitated by the fact that the regulations are applied in a general-abstract form.

Although special legislation and even a special anti-bullying law is unlikely to bring bullying to a quick end, the legislature would make a point that this phenomenon is no longer acceptable in Germany but is outlawed in a general social sense. Such a signal, which unfortunately does not exist, would be more than desirable and would clarify to the bullying victim that society does not condone the actions of the bully. What has happened in connection with stalking by the creation of paragraph 238 of the penal code (§ 238 StGB) in 2007, should finally be transferred and applied to the problem of bullying.

VI. National policies

Politically speaking, there really seems to be no bullying. Although there is a quite new bill from the ranks of the Piratenpartei (pirate party)³⁷ it is possibly going to be ignored.

In March 1997, the then parliamentary group PDS, from which today's Die Linke (the left) is originated, experienced the same. Their introduced bill was so poorly drafted that it did not go beyond the stage of a public hearing of experts in the Bundestag (Lower House of the German Parliament). A promised review of the expert consultation on the draft law has not been carried out yet.

Regarding to the Federal Government, it must be referred to the reply dated 25.07.2007,³⁸ on a request from the ranks of the parliamentary party Die Linke. There the question of whether the government had the intention to create a legal definition of bullying and harassment and explicitly criminalize it, was answered as follows: Because of the many forms of bullying a creation of a specific regulatory framework to target and combat harassment seems futile. It is the goal of the Bundesregierung (Federal Government)³⁹ to specifically take preventative measures in advance. This view is also

³⁷ http://wiki.piratenpartei.de/AG_Anti-Mobbing-Gesetz

³⁸ Deutscher Bundestag, 16. Wahlperiode, Drucksache 16/6139.

³⁹ Remark: Chancellor at this time was Angela Merkel.

confirmed by the BAuA-study of bullying.⁴⁰ Instead of new law making, personal and organizational managers in enterprises are specially requested to take appropriate measures, so that everyday conflicts in the workplace do not develop into bullying cases.

To put it succinctly, if with a little anger, it seems that bullying is not to be an issue that enjoys the attention of the Federal Government. It was the same under the chancellorship of Gerhard Schröder. There are just (always) more important issues that need to be addressed and dealt with – such as the current financial situation of the member states of the European Union.

Overall, since the beginning of the discussion in the early 1990s the impression is, that there will be legislative action only if Germany is encouraged by the European Union. We can only hope that the mills in Brussels grind faster than those in Berlin.

VII. Importance of the judiciary

On 07.01.2013 in the legal database www.juris.de 1,189,370 court decisions were documented. Of these 1,111 decisions were filed under the keyword “Mobbing” (bullying) and 923 with the search filter “AGG” (general equal treatment act). These figures demonstrate that the German courts deal only rarely and more on the periphery with workplace bullying and harassment. If one focuses on the issues in dispute, it is clear that the claim of the plaintiffs in these cases was focussed on obtaining damages for pain and suffering. Success has always been modest. Only very few complaints have so far been successful. Problems of accountability and proof of acts of bullying were and are the main reasons, if the existence of bullying was not negated by the court beforehand.

Going to court seems generally to be less suitable for dealing with bullying. As a rule, it is only an option, when termination of employment is sought and in order to receive payment of the highest possible compensation. However, this requires the willingness of both sides – both the plaintiff and the defendant. If an amicable settlement fails, there is inevitably a decision of the court, which – as stated before – is usually negative for the bullying victims.

The most serious reason why bringing an action for bullying to court does usually not help is, that the court is not a means of resolving conflict. Courts dispense judgements, so they judge the dispute in question. They do no more, they also do no less. If one, however, seeks to deal with a conflict situation, this should be tried outside the court by using moderated discussions. If and in which way the Gesetz zur Förderung der Mediation und anderer Verfahren der außergerichtlichen Konfliktbeilegung⁴¹ (law for promotion of mediation and other methods of alternative dispute resolution) which came into force on 26.07.2012 may help to overcome specific bullying situations, must be seen. According to the directive in force, since that day the new provisions of paragraph 54a section 1 of the labour court act (§ 54a Abs. 1 ArbGG [Arbeitsgerichtsgesetz]), the labour court can propose to the litigants mediation or other methods of alternative dispute resolution. According to paragraph 54 section 6 (§ 54 Abs. 6) ArbGG the presiding judge may direct the parties for the conciliation process and its continuation to a non-decision making judge for that purpose. This Güterichter (benevolence judge) can use all methods of conflict resolution, including mediation.

⁴⁰ Remark: BAuA ist the abbreviation of “Bundesanstalt für Arbeitsschutz und Arbeitsmedizin”. The authors of the study were Meschkutat/Stackelbeck/Langenhoff (footnote 9).

⁴¹ Bundesgesetzblatt 2012 Teil I Nr. 35 vom 25.07.2012, page 1577 (www.bundesgesetzblatt.de).

The special importance of the law in connection with workplace bullying and harassment lies in the field of legal education. As far as the problem of bullying is concerned, the eighth penal of the Bundesarbeitsgericht (Federal Labour Court), by its judgment of 25.10.2007⁴² did just that. In its decision the Panel emphasizes that the German legislator with the definition of “Belästigung” (harassment) in paragraph 3 section 3 (§ 3 Abs. 3) ArbGG ultimately circumscribed bullying – albeit in connection with those listed in paragraph 1 (§ 1) AGG discrimination of race, ethnic origin, gender, religion or philosophy of life, disability, age and sexual identity. In paragraph 3 section 3 (§ 3 Abs. 3) AGG the circumscribed word bullying can be transferred beyond paragraph 1 (§ 1) AGG, to cover all cases of discrimination. As a consequence, this means that the rules of the Allgemeines Gleichbehandlungsgesetz (general equal treatment act) in the context of a specific bullying case can be applied – directly, where features of paragraph 1 (§ 1) AGG are affected, or indirectly (analogue), provided that the characteristics of paragraph 1 (§ 1) AGG are not touched.⁴³

Since that decision in 2007, the eighth penal of the Federal Labour Court has unfortunately not had the opportunity to expand the trodden path any further. If and when this will be the case is uncertain. This requires a corresponding revision.

VIII. Intervention and prevention in companies

The intervention and prevention of bullying in Germany takes place at business or company level. Trade unions and employers organizations are not directly involved. They rather train and advise their members. There are no specific collectively agreed provisions for bullying. Such provisions are only conceivable in company specific agreements.

In Germany there are two ways of workplace representation on an operational level. In the private sector, the Betriebsverfassungsrecht (works council law) is applied; in the public sector, it is the Personalvertretungsrecht (staff representation law). Both are different in many ways, so I will only refer to the works council law from here on.

Representation at the operational level is made by the Betriebsrat (works council). This body is the result of democratic elections and it depends on the number of employed workers in the organisation. The establishment of workplace representation is carried out on a voluntary basis by the employees. These elect from their ranks the people they want to represent their interests towards the employer. Works council members are elected for a term of four years. The works council mandate is an honorary post, for which there is an exemption from professional activities.

If an organisation has several works councils – hence several companies – it has to establish a Gesamtbetriebsrat (joint works council) where each of the works councils appoints up to three members. While the work of the works council is limited to the establishment concerned, the joint works council takes care of those matters that affect the entire organisation.

The Betriebsparteien (operating parties = works council or joint works council on the one hand and the employers on the other side) have the opportunity for a wide range of cooperation in the workplace in form of agreement on rules and regulations and copperfasten them by written agreement. Such an Betriebsvereinbarung (operational agreement)

⁴² 8 AZR 592/06 (www.bundesarbeitsgericht.de).

⁴³ Meaning and consequences of the decision: Wolmerath (footnote 45, Festschrift für Kunishige Sumida), page 271.

applies directly and is compulsory for employees of the company. In Germany, operational agreements concerning bullying and harassment are not discussed any more. In this regard, the main question is not “if” but rather “how.” Similarly, agreements are possible on a corporate level. These are called *Gesamtbetriebsvereinbarung* (general agreement). Even on a corporate level it is possible to have a *Konzernbetriebsvereinbarung* (group agreement) for bullying and harassment.

While early operational agreements tackled bullying as singular manageable problem, it is now common knowledge that a comprehensive rulebook is necessary, to establish a comprehensive regulatory framework for all forms of psychosocial stress in the workplace. Going a step further is the approach of the *Allgemeines Gleichbehandlungsgesetz* (general equal treatment act) to use the *betriebliche Beschwerdestelle* (company complaints board)⁴⁴ which is mentioned in the law and extend it by addition of bullying and other forms of psychosocial stress.⁴⁵

Regular content of a company agreement on bullying issues are both intervention and prevention, where prevention is of particular importance. Anyone who succeeds in withdrawing breeding ground for bullying will rarely find themselves in a situation where intervention is necessary.

The intervention, the taking of action in an acute bullying situation, is determined by the provision of tools for conflict resolution. Many operating agreements tread a particular procedural path, as for example do the Ford plants in Germany.⁴⁶ Usually, the aim is to achieve a win-win situation.

Independently hereof, the employer can sanction a bully for his actions from a (employment) contractual point of view. This can be done by means of a warning, a transfer or in the worst case: a dismissal. This, however, requires appropriate action by the employer, such as a hearing of the works council before the actual transfer or dismissal. The bully, in turn, can have his dismissal checked for its validity by the labour court.

IX. Role and functions of voluntary organizations

From the outset, the discussion about the bullying problem has been carried out by NGOs. Trade unions as well as religious institutions also took part. Health insurances also recognized very quickly, that action was required. Representatives of these groups set up bullying helplines, where those who were bullied could turn. These are a first port of call, but unfortunately, they do not exist everywhere in Germany. At this point should be mentioned as exemplary the “*Mobbing-Hotline Baden-Württemberg*” (bullying hotline Baden-Württemberg)⁴⁷ and the “*MobbingLine Nordrhein-Westfalen*” (bullying line North Rhine-Westphalia).⁴⁸ The latter celebrated its tenth anniversary in November 2012 with a

⁴⁴ Paragraph 13 section 1 (§ 13 Abs. 1) AGG.

⁴⁵ For further details: Wolmerath/Esser, *Werkbuch Mobbing. Offensive Methoden gegen psychische Gewalt am Arbeitsplatz*, Frankfurt am Main 2012, pages 62 – 64. Fundamentally: Wolmerath, *Mobbing und Allgemeines Gleichbehandlungsgesetz*, in: *Festschrift für Kunishige Sumida zum 70. Geburtstag*, Studien zum Persönlichkeitsrecht des Arbeitnehmers, Band II, Tokyo 2011, page 271.

⁴⁶ Footnote 45.

⁴⁷ Zahner, *Überbetriebliche Beratung und Unterstützung durch die Katholische Betriebsseelsorge*, in: Wolmerath/Esser, *Werkbuch Mobbing. Offensive Methoden gegen psychische Gewalt am Arbeitsplatz*, Frankfurt am Main 2012, page 122 (130).

⁴⁸ Wessels/Deilmann/Saßmannshausen, *Die MobbingLine Nordrhein-Westfalen – eine bewährte Anlaufstelle für Mobbingbetroffene*, in: Wolmerath/Esser, *Werkbuch Mobbing. Offensive Methoden gegen psychische Gewalt am Arbeitsplatz*, Frankfurt am Main 2012, page 154.

symposium titled: “Mobbing vermeiden – Faire Arbeit fördern” (avoiding bullying – promoting fair working) and was organized by the North-Rhine-Westphalian Federal Department of Labour, Integration and Social Affairs. As much as the department’s commitment to the bullying hotline is commendable, as much it became clear at the symposium, that when it comes to bullying, the “MobbingLine Nordrhein-Westfalen” (bullying line North Rhine-Westphalia) is the only activity the state government is involved in.

Many of those affected by bullying took their own experience as an opportunity and started self-help groups. Some of these have been around for several years; others were disbanded after a short time. A network or an association of self-help groups or an umbrella organisation for self-help groups does not exist. Everyone is plodding along, the motives and goals are highly variable. Some institutions offer their support and assistance free of charge, others charge and promote legal protection insurance.⁴⁹ There are also supposed to be support groups that are acting as a cover for sects.

In specific cases, when nothing else helps, the “TelefonSeelsorge” (crisis helpline) is an indispensable aid. It is a charitable institution that is represented nationwide and free to access both over the phone and via the Internet. About 8,000 specially trained volunteers can be reached around the clock every day of the year. The crises helpline is often the last contact if there is no one (anymore) who is willing to talk to the bullying victims.

X. Future prospects

When I look to the future, then, in spite of the currently sobering reality, I look at it with optimistic hope that in the next few years bullying will be eradicated. This hope is not carried by politics and the German legislator. It is based on the development towards an aging society, in which the active workforce is becoming increasingly scarce and therefore more valuable. This will inevitably mean that employees will gain more appreciation and respect. The first signs are already visible in those companies, that recognized this trend and who have taken measures, which lead to a better work-life balance. In the foreseeable future, people-friendly working conditions, employee benefits and a good working and operational climate will be the criteria when employees have to decide between two or more companies.

Until then, it will be up to the works councils and employers to decide and agree operational rules that help to stop bullying and other manifestations of psychosocial stressors. Therefore, it is clear, who the losers are going to be. It will be especially those workers in companies where there is no or no functioning employee representation. They will have no choice but turn their eyes to Brussels in the hope that the European Union will give directives for anti-bullying policies to the German legislator, which will have to be implemented into national law within a given time frame.

⁴⁹ www.mobbing-zentrale.de charges 60 €/hour for consulting services and recommends the legal costs insurance “DAS.”

Workplace Bullying and Harassment in South Korea

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1. The current situation of workplace bullying and harassment in Korea

Recently, Korean society has been shocked by the news of numerous suicides among middle or high school students who were mobbed at their schools. In addition to the violence of mobbing, bullying, and harassment at schools, this kind of violence in the workplace is an alarming concern for Korean society. For instance, there were two brutal incidents in 2012, one in February, when a man shot his former colleagues and superiors with a shotgun, the other in August, when a man robbed innocent citizens of their lives by stabbing them, though his original targets were his former colleagues and bosses. The common denominator of these two incidents is that the two men insisted they were bullied at their workplaces and their offenses were to get their revenge on the colleagues who bullied them.

Human beings are social animals, so we cannot live without other humans. People need socialization, and we have to keep in harmony with others at our organizations, such as schools or places of work. While Koreans have realized the severity of bullying and harassment problems in our society, our efforts to address the issue have focused on the bullying or harassment among students and not at the workplace. Hence, neither the Korean Statistical Information Service nor the Ministry of Employment and Labor have provided nationwide statistics or data on workplace bullying and harassment. Instead, even though the results are unofficial, some online job websites are regularly surveying and providing the relevant data in regards to bullying or mobbing in the workplace.

I will introduce two current data on workplace bullying and mobbing in Korea. One is a survey that *Segye Ilbo* (a Korean newspaper) and “Job Korea” (an online portal with employment information) published on 7 March 2012. Among the 376 respondents (95% confidence level, sampling error of $\pm 5.1\%$), 285 workers (75.8%) answered that they had been psychologically bullied through, for instance, abusive language or the excessive invasion of privacy. The survey’s patterns (multiple answers) were categorized as verbal abuse (147 workers, 51.6%), semi-forced participation in dining events (94 workers, 33.0%), discrimination on the grounds of educational background, appearance, etc. (69 workers, 24.2%), bullying (62 workers, 21.8%), ignored contributions (45 workers, 15.8%), and sexual harassment (43 workers, 15.1%). Furthermore, concerning how the respondents took action when they were psychologically bullied, 241 workers (84.6%) indicated that they “tolerated the situation,” and 44 workers (15.4%) took measures to deal with the situation. Of the former group, the reasons given for tolerating the situation included: “I thought that it was part of the organization’s culture” (61.4%) and “I thought I could endure it” (27.0%).

More surprising, in-depth interviews with 10 respondents revealed a consensus that “psychological suffering would be more comfortable for me than physical violence.” Lastly, 236 workers (82.8%) answered: “I deeply considered quitting the company” when confronted with bullying. Thus, we can understand that psychological harassment, an “invisible” form of bullying because we tend to overlook it, could be robbing the victims of their working lives.

The other data is a survey that “SaramIn,” an online website for employment information, publicized on 31 July 2012, showing that, among the 3035 workers who participated in the survey, 30.4% have had the experience of being mobbed at their workplace. By gender, 34.1% of female workers and 27.6% of male workers have been mobbed at the workplace. The average period of harassment was seven months, and the bullies were mainly “superiors” (43.2%, multiple answers), “senior colleagues” (38%), “colleagues who joined the company in the same year” (28.2%), and “junior colleagues” (18%). Moreover, the situations in which the respondents felt that they were mobbed included: “when other workers say something behind my back” (57.2%, multiple answers), “when I heard others talking behind my back” (53.1%), “when I am the only one who does not know about the work-related dinners or other private meetings” (34.7%), “when I say ‘Hello’ to my co-workers, but they frequently ignored me” (25.6%), and “when errands or trivial work are mainly allotted to me” (20.8%). Finally, the effects of being mobbed included: “I felt my loyalty to the company weakening, so I thought about changing jobs” (56.8%, multiple answers), “I lost my self-confidence” (47.7%), “I became very sensitive” (45.5%), “my work efficiency had reduced” (41.4%), and “I began to have trouble sleeping or became depression” (33.7%). They all suffered negative effects of being bullied in the workplace.

Granted, the abovementioned data are not official statistics from Korean national agencies, so the overall accuracy of the data remains in doubt. However, it is apparent that Koreans recognize workplace bullying or harassment as societal problems. In fact, the first court decision¹ that acknowledged the liability for compensation regarding workplace bullying occurred in December 2009. The lateness of this court decision (2009) directly reflects how Koreans have been unaware of bullying at the workplace.

As far as I know, this decision, which is based on Article 750 of the Civil Act,² is the first case of workplace bullying in Korea.

2. The definitions of mobbing, bullying, and harassment, and previous research on workplace bullying, harassment and mobbing in Korea

In this chapter, I will investigate the definitions of “bullying,” “harassment,” and “mobbing,” and then I will trace the implications for these definitions based on Korean cultures, sentiments, and societal situations. I will pursue this approach because the actions related to bullying, harassment, and mobbing are likely to differ among countries on the

¹ Busan District Court Decision 2008 Gadan 167281 Decided December 18, 2009 (부산지방법원 2009. 12. 18. 선고 2008 가단 167281 판결).

² CIVIL ACT

Article 750 (Definition of Torts)

Any person who causes losses to or inflicts injuries on another person by an unlawful act, willfully or negligently, shall be bound to make compensation for damages arising therefrom.

basis of cultural backgrounds. Thus, with the establishment of clear definitions, we can understand which actions are to be categorized in these three concepts and the specifically Korean societal need to understand and prevent those categorical actions.

2.1 workplace bullying, harassment, mobbing in previous research in Korea

The research on bullying, harassment, or mobbing at the workplace is typically conducted through studies of management, psychology, medical science, and the law; however, the accumulative amount of research is still sparse.

The research on workplace bullying, harassment, or mobbing in management studies have been conducted from the angle of organizational behavior and human resource management, such as “The Impact of Mobbing on Employee’s Attitude or Job Attitude,”³ “Research on Organizational Efficiency Due to Workplace Mobbing,”⁴ “The Relationship Between the Psychological Work Environment and Mobbing at the Workplace,”⁵ and “The Influence of Workplace Mobbing on Organizational Behavior.”⁶ The abovementioned research mainly considers workplace bullying or mobbing as factors obstructing the improvement of efficiency in the workplace.

The first study on workplace bullying from a legal perspective was a “Legal Remedy for Workplace Mobbing.”⁷ However, nothing more was pursued until J.H. Kim’s (2002) “Research on Relief of Retired Employees Resulting from the Pressure to Retire, Mobbing, and Bullying in the Workplace.”⁸ In recent years, some more studies have occurred, such as the “Study on Workplace Mobbing,”⁹ “Employees Mobbing at the Workplace,”¹⁰ and “Mental Illness and Labor.”¹¹ Furthermore, some studies have tried to introduce legislative systems or trends from foreign countries: “Workplace Mobbing in German Labor Law,”¹² “Regulating Harassment in the Workplace in the United Kingdom,”¹³ and “Workplace Mobbing in French Labor Law.”¹⁴

The most noticeable point among these studies is the diverse conceptions on bullying, mobbing, and harassment in the workplace that the various researchers give. Hence, it is difficult to define these concepts. For instance, J.H. Lee (2009) indicates, “if we can explain the action or present state that we try to refer to without any difficulty, there is no

³ Choi, H.S., & Lim, H.C. (2005). The Impact of Mobbing on Employee’s Attitude. *Korean journal of business administration*, Paper of autumn academic conference, 21-44; Park, K.K., Choi, H.S., & Kim, H.Y. (2006). The Impact of Mobbing on Employees’ Job Attitude: Investigation on Moderating effect of self-esteem. *Zeitschrift fur Wirtschaftswissenschaften*, 35, 169-193.

⁴ Park, J.M. (2009). A Study on the Relationship between Mobbing and Organizational Effectiveness. Korea University of Technology and Education (master’s thesis).

⁵ Choi, H.S., & Park, H.S. (2010). Relationship between Psychological Work Environment and Mobbing at Workplace: Investigation on Moderating Effect of Neuroticism. *Journal of Korea service management society*, 11(2), 209-232.

⁶ Park, K.K. (2005). The Mobbing in the Organization; Its Influence on Organizational Behavior. *Sogang Journal of Business*, 16(2), 115-127.

⁷ Kim, Y.M. (1998). Legal Remedy for Workplace Mobbing. *Lawyers Association Journal*, 498, 128-158.

⁸ Kim, J.H. (2002). Research on Relief of Retired Employees Resulting from Pressure to Retire, Mobbing and Bullying in the Workplace. *Hanyang Law*, 13, 215-227.

⁹ Lee, J.H. (2009). A Study on Workplace Mobbing. Korea University (master’s thesis).

¹⁰ Lee, D. H. (2011). Employee’s Mobbing at the Workplace. *Chung-Ang Law Review*, 13(4), 477-528.

¹¹ Shin, K.C. (2012). Mental Illness and Labor – Focusing on Legal Issues. *Research on Labor Law*, 32, 193-236.

¹² Oh, S.H. (2011). Mobbing in German labor law. *Kyungpook National University Law Journal*, 37, 337-366 ; Kim, H.S. (2012). A Study on the Mobbing: Bullying in the German Law. *Journal of Business Administration and Law*, 22(2), 349-392.

¹³ Shim, J.J. (2012). Regulating Harassment in the Workplace: The Case of the United Kingdom. *Korean Society of Comparison Labor Law*, 25, 45-78.

¹⁴ Jo, I.Y. (2012). Workplace Mobbing and French Labor Law. *Korean Society of Comparison Labor Law*, 25, 1-43.

reason why we make a special effort to make each word indicate each action. Therefore, I will employ the words of ‘workplace mobbing’” (15). Likewise, when introducing the concept of mobbing in Germany, H.S. Kim (2012) points out that “it is better to arrange the general character which constitutes the word rather than to spend endless pains on knowing the exact terminology” (353), so he did not establish the concept of mobbing or bullying in his study. Lastly, D.H. Lee (2010) regards the concept of mobbing as “the collective, repetitive act of being mobbed by a person, individual, or group with more power than an employee in the workplace” (481).

From the previous literature, it is clear that there are no provisions to deal with the phenomena of mobbing, harassment, or bullying at the workplace in Korean labor law or regulations. More importantly, most researchers in Korea have focused on the “mobbing” issue in the workplace, while offering diverse and obscure definitions of the term and its relation to bullying and harassment. Thus, these concepts have yet to be clearly defined.

2.2 The definitions of bullying, harassment, and mobbing

In order to clarify our understanding of bullying, harassment, and mobbing, I will look into dictionary definitions of those terms.

In Korea, we often use the words “괴롭힘 (*Goerobhim*),” “따돌림 (*Ttadollim*),” “왕따 (*Wanta*),” “음해 (*Eumhae*),” and “구박 (*Gubak*)” to indicate the acts of bullying and harassment. According to the Standard Korean Language Dictionary of The National Institute of The Korean Language,¹⁵ “괴롭힘 (*Goerobhim*)” is a noun of the verb “괴롭히다 (*Goerobhida*).” *Goerobhida* means “to make someone feel uncomfortable in body and mind, to distress someone.” “따돌림 (*Ttadollim*)” is a noun of the verb “따돌리다 (*Ttadollida*).” *Ttadollida* is to “exclude or keep away from someone hated or disliked.” “왕따 (*Wanta*)” is “to exclude someone, or to cast them out”, “음해 (*Eumhae*)” is “to do harm to someone secretly by wicked ways,” and “구박 (*Gubak*)” is “to distress tormentingly.”

According to Collins Cobuild Advanced Dictionary,¹⁶ “bullying” is a noun of the verb “bully” that means that “someone who uses their strength or power to hurt or frighten other people.” “Harassment” is “behaviour which is intended to trouble or annoy someone, for example repeated attacks on them or attempts to cause them problems.” “Mobbing,” which is academically similar to bullying, relates to the word “mob,” a “large, disorganized, and often violent crowd of people.” Moreover, according to the Longman Dictionary of Contemporary English,¹⁷ to “bully” is “to threaten to hurt someone or frighten them, especially someone smaller or weaker,” the verb “harass” is “to make someone’s life unpleasant, for example by frequently saying offensive things to them or threatening them,” and “mob,” the noun of “mobbing,” is “a large noisy crowd, especially one that is angry and violent.” Finally, according to the Cambridge Dictionaries Online,¹⁸ “bullying” is “to hurt or frighten someone who is smaller or less powerful than you, often forcing them to do something they do not want to do,” “harass” is “to continue to annoy or upset someone over a period of time,” and a “mob” is “a large angry crowd, especially one which could easily become violent.” By the way, in the case of the United Kingdom, the “ACAS Policy

¹⁵ http://www.korean.go.kr/09_new/index.jsp

¹⁶ <http://www.mycobuild.com/>

¹⁷ <http://www.ldoceonline.com/>

¹⁸ <http://dictionary.cambridge.org/>

Discussion Paper” (2006),¹⁹ published by the Advisory, Conciliation, and Arbitration Service (ACAS), defines “bullying” as “offensive, intimidating, malicious or insulting behaviour, an abuse or misuse of power through means intended to undermine, humiliate, denigrate or injure the recipient.” That same paper gives a definition of “harassment” as “unwanted conduct affecting the dignity of men and women in the workplace. It may be related to age, sex, race, disability, religion, sexual orientation, nationality or any personal characteristic of the individual, and may be persistent or an isolated incident.” The difference between them is that “The harassment definition makes clear that an individual’s dignity is affected by harassing behaviour and that the harassment is unwanted. While the definition of bullying does not express bullying as unwanted, it is taken for granted that no one desires bullying or that their dignity is affected by bullying. The other key difference between bullying and harassment, that the above definitions make clear, is that harassment is linked to a personal characteristic of the recipient, and therefore linked to anti-discrimination law in this country.”

Additionally, the website “Bully OnLine”²⁰ that is the world’s largest resource on workplace bullying and related issues defines “bullying,” “harassment,” and “mobbing.” According to “Bully OnLine,” The MSF Union defines “bullying” as “Persistent, offensive, abusive, intimidating or insulting behaviour, abuse of power or unfair penal sanctions which makes the recipient feel upset, threatened, humiliated or vulnerable, which undermines their self-confidence and which may cause them to suffer stress,” and Tim Field indicates that “Bullying is a compulsive need to displace aggression and is achieved by the expression of inadequacy (social, personal, interpersonal, behavioural, professional) by projection of that inadequacy onto others through control and subjugation (criticism, exclusion, isolation etc). Bullying is sustained by abdication of responsibility (denial, counter-accusation, pretence of victimhood) and perpetuated by a climate of fear, ignorance, indifference, silence, denial, disbelief, deception, evasion of accountability, tolerance and reward (eg promotion) for the bully.” Considering “mobbing,” “The word mobbing is preferred to bullying in continental Europe and in those situations where a target is selected and bullied (mobbed) by a group of people rather than by one individual.” And the different between bullying and harassment is that “acts of harassment usually centre around unwanted, offensive and intrusive behaviour with a sexual, racial or physical component.”

2.3 The conceptual approach to bullying, harassment, and mobbing in this paper

When considering the above definitions, I will classify the peculiarities of bullying, harassment, and mobbing.

In the case of bullying, bullies certainly have “strength” or “power” over their victims. Yet, if there is no obvious superiority in the workplace, the case of abuse by a subordinate or a colleague in a horizontal relationship might not fall under the category of “bullying.” Therefore, bullies have to be in superior positions, and the act of bullying is individual (it is not a group mentality). Furthermore, psychological bullying is more applicable to the workplace than physical bullying, and repeated acts are more common than one-time acts. Finally, the reasons for acts of bullying resulted from such as victim’s job performance that

¹⁹ ACAS (2006), Workplace Bullying and Harassment: Building a Culture of Respect. ACAS Policy Discussion Papers, 4, 2.

²⁰ <http://bullyonline.org/>

makes for other persons to recognize the bullying acts.

Harassment is an extensive concept because the performer and victim need not be a superior and subordinate, respectively. Likewise, the number of performers does not affect the nature of harassment, nor do distinctions between physical or psychological harassment and repeated or one-time acts. However, the biggest difference being bullying and harassment is that harassment is specific to the victim's sex, race, age, religion, disability, etc. and is clearly recognized in others as such.

Mobbing is a term that is current in European discourse, especially regarding the workplace, whereas bullying is often used to describe school situations. Mobbing could be categorized as a subset of bullying, but the performers of mobbing have to be groups, not individuals, irrespective of the performers' standing in an organization's hierarchy, and mobbing usually involves repeated acts.

Based on these definitions, it is clear that recent scholarly publications in Korea have focused on cases of mobbing at the workplace. A discussion on workplace bullying and harassment is long overdue when compared to discussions on workplace mobbing.

We can assume that bullying, harassment, and mobbing have their own unique attributes, but in actual work situations, the acts of bullying, harassment, and mobbing may show characteristics that are particular to the workplace, and the concepts may have various intersections that are unique to the work environment. Therefore, the objective of this paper is to explain actual situations in Korean workplaces and to draw the implication from the above discussion on the basis of Korean society. This research combines the reviewed literature of scholarly publications and newspapers with interviews conducted with experts²¹ to grasp actual cases and trends about workplace bullying or harassment issues in contemporary Korean society.

3. The background in which workplace bullying and harassment have occurred and current changes in Korean society

3.1 The establishment of “measures to prevent mobbing in workplaces” in 1999 and its contents

At the end of 1997, due to the financial crisis that affected Korean society, many businesses were forced to carry out restructuring in a desperate effort to survive. Businesses tried to utilize workers' productivity and abilities as much as possible while greatly reducing the number of workers in order to reduce fixed costs such as labor. However, workers made desperate efforts not to be the subject of employment adjustments. In this situation, workers frequently slandered and defamed their colleagues, although this did not happen outwardly.²² Furthermore, businesses that had to carry out restructuring actually conducted mobbing to select the employees for layoffs.²³

²¹ Two interviews with experts were conducted: one on 13 December 2012, with Mr. Sungho Ahn, a certified public labor attorney who offers counseling services for human resource management, mainly concerning sexual harassment at the workplace and workplace bullying; the other on 17 December 2012, with Mr. Junheui Lee, who wrote his Master's thesis on “The Study on Mobbing in the Workplace” (2009). With his working experiences at the Korea Employer's Federation, he is also offering advice on workplace bullying issues.

²² Kim, Y.M. (1998). Legal Remedy for Workplace Mobbing. *Lawyers Association Journal*, 498, 128.

²³ Kyunghyang Shinmun 1999.5.10; Hankyoreh Shinmun 1999.5.10; Kim, J.H. (2002). Research on Relief of Retired Employees Resulting from Pressure to Retire, Mobbing and Bullying in the Workplace. *Hanyang Law*, 13, 215 ; Park, K.K. (2005). The Mobbing in the Organization; Its Influence on Organizational Behavior. *Sogang Journal of Business*, 16(2), 115.

As a result of these situations, the Ministry of Employment and Labor announced “Measures to Prevent Mobbing in Workplaces” for the first time in May 1999. Based on the judgment that the recent social problem of mobbing was serious enough to affect industrial fields and labor disputes, in particular, the Ministry of Employment and Labor prepared to enforce measures to prevent mobbing.²⁴

In April 1999, the striking workers of the Seoul Subway Union created a specific catalyst for the ministry’s intervention. The union mobbed against employees who did not participate in the strike or who broke away from it. The Seoul Subway Union called the strike against the civic government and the Seoul Metropolitan Subway Corporation’s restructuring plan, whereby the union passed a resolution for “guidelines for the struggle by the general strike” to enable the union to “punish,” in any way, “union members who did not participate in the strike or who broke away from the strike.”²⁵ In fact, those who broke away from the strike became hesitant to go back to work, fearing that other union members would mob them and that violent language and other forms of violence would be used against them. Consequently, the union head and several instigators who actively participated in the violence eventually faced judicial actions.

The Ministry of Employment and Labor defines mobbing as “mentally or physically harmful acts conducted by business owners, superiors, or workers who formed a group to alienate a certain person from the group to which the person belongs, thereby restricting his performance of roles as a member or neglecting or slandering him.”²⁶ The types of mobbing in the workplace, as specified by the Ministry of Employment and Labor, are as follows:²⁷

- * Department members whispering to each other with their own languages and laughing at a certain person’s mistakes;
- * Assigning a certain person to a department in which workloads are excessive without considering his/her health conditions or deploying him/her to an unimportant post;
- * Excluding a certain person from congregate dining events/meetings;
- * Speaking ill of a certain person’s clothing/ways of speaking/behavior or disclosing his/her personal physical flaws;
- * Not providing job-related information or not cooperating with a certain person;
- * Treating a certain person as incompetent and not dealing with him/her; and
- * Stigmatizing a certain person, even though he/she works hard.

The Ministry of Employment and Labor also established a policy to take legal action (on the charge of violating the Labor Standard Act) against those who fire or unjustly transfer workers afflicted with mobbing and (on the charge of violating the Equal Employment Opportunity Act) against those who exclude female workers. Moreover, the Ministry of Employment and Labor imposed criminal penalties (on the charge of interference with business) when the conditions of mobbing became violent language, physical violence, menacing threats, etc. Finally, the Ministry of Employment and Labor recommended that individual businesses establish and enforce company regulations that autonomously impose sanctions against mobbing. However, in the process of being

²⁴ Hankyoreh Shinmun, 1999.5.10.

²⁵ Dong-A Ilbo, 1999.4.24.

²⁶ Kyunghyang Shinmun, 1999.5.10; Weekly Dong-A, 2000.6.1.

²⁷ Hankyoreh Shinmun, 1999.5.10.

concretized, these policies have faced objections from many stakeholders and, thus, concrete policies have not yet been presented.²⁸

3.2 Characteristics of changes since the 2000s

No government agencies have produced guidelines or regulations regarding workplace mobbing, bullying, or harassment since 1999. However, we know that the situations of workplace bullying have been spreading. According to “Scourt,” a website offering employment information, in April 2003, 9.1% of all respondents (5024 people) have been bullied at work, and 23.6% of those who have been bullied resigned from the companies that employed them.²⁹

Of course, it is difficult to compare that data with the situation in 2012, since there are different research subjects and organizations. Yet, recent data by SaramIn shows that 30.4% of respondents replied that they have had some experience with workplace bullying or harassment. In this respect, the number of employees having experiences with workplace bullying is increasing.

The main reasons for the recent increase in workplace bullying are decreasing job security and increasingly fierce competition for jobs due to structural adjustments and the mergers and acquisitions (M&A) of businesses.³⁰ Yet, from the purview of contemporary neoliberalism, some major Korean businesses, such as Samsung, LG, and SK, have taken stride to address bullying and harassment issues at work. Nevertheless, the majority of local Korean companies have yet to show initiative in this concern. This is because multinational enterprises (MNEs) in Korea already have corporate cultures that “respect the individual” and global policies for harassment issues, whereas local Korean companies do not.³¹

Why then have local Korean companies not addressed workplace bullying and harassment so far? And why are these issues becoming company concerns and social problems? The answers could involve Confucianism, a militaristic culture, and a change of consciousness in the younger generation.

Confucian ideas have influenced Korean society for a long time. In particular, we have been educated in the principle of “elders first,” which means that the young should give deference to their elders. This idea is deep-rooted in Korean culture. Thus, it is traditional for the young not to defy their parents, elder, or superiors in any group dynamic to which the young belong, an idea that it reinforced in Korea’s military culture.

For over 60 years, South Korea has maintained a ceasefire with North Korea, but two years of military service is required of male citizens of South Korea who are over 18 years of age. For that reason, almost all Korean men experience the very strict, military relationship between subordinates and superiors for two years, and they grow accustomed to the abusive language of their superior officers. When these men finish their military service and enter the business world, they maintain rigid relationships with their corporate

²⁸ In fact, the ministry’s text on “Measures to Prevent Mobbing in Workplaces” could not be obtained from the homepage of the Ministry of Employment and Labor. Labor law experts point out that, after its announcement in 1999, the policy fizzled out, and thus, it was not properly implemented. This paper consequently relies on newspaper reports from the time of announcement to reconstruct the contents of this policy.

²⁹ Ohmynews, 2003.4.2.

³⁰ Park, K.K., Choi, H.S., & Kim, H.Y. (2006). The Impact of Mobbing on Employees’ Job Attitude: Investigation on Moderating effect of self-esteem. *Zeitschrift für Wirtschaftswissenschaften*, 35, 170 ; Park, J.M. (2009). A Study on the Relationship between Mobbing and Organizational Effectiveness. Korea University of Technology and Education (master’s thesis), 1.

³¹ Interview with Mr. Ahn.

superiors, as reflected in the occupational hierarchies and seniority systems of Korean companies. Therefore, the abusive language and actions of superiors or elders in a company might be accepted as normal and not the deeds of bullies.

However, change of consciousness is occurring in the younger generation of Korea. With greater frequency, youths are questioning the actions of their superiors or colleague; hence, the problems related to bullying and harassment at the workplace are now coming to light.

Some experts also point out that workplace bullying originates in a lack of human relation skills, personality education, and the intense competition of work. Moreover, current employees in their 20s and 30s have a strong individualistic inclination, which leads to conflicts with their peers or superiors, reinforcing the perception of being victims of workplace bullying and harassment.³²

4. Legal regulations related to workplace bullying and harassment

4.1 The present state of legislations pertaining to bullying and harassment

At present, there are no specific Korean regulations or legislations to prevent or deal with workplace bullying and harassment. When bullying or harassment occur in the workplace, the relevant provisions of the Civil Act and Criminal Act, and labor-related regulations of the Labor Standards Act³³ and the Act on the Promotion of Workers' Participation and Cooperation³⁴ are used to handle the problems.

Of course, some legislation stipulates on bullying and harassment, providing definitions on the terms. For instance, Article 2 of the Equal Employment Opportunity and Work-Family Balance Assistance Act has definitions for "discrimination" and "sexual

³² MK Business News, 2012.2.17.

³³ LABOR STANDARDS ACT

Article 7 (Prohibition of Forced Labor)

An employer shall not force a worker to work against his/her own free will through the use of violence, intimidation, confinement, or any other means by which the mental or physical freedom of the worker might be unduly restricted.

Article 8 (Prohibition of Violence)

An employer shall not do violence to a worker for the occurrence of accidents or for any other reason.

³⁴ ACT ON THE PROMOTION OF WORKERS' PARTICIPATION AND COOPERATION

Article 26 (Grievance Handling Committee)

Every business or workplace shall have a grievance handling committee to hear and handle workers' grievances: Provided, that this shall not apply to business or a workplace employing less than 30 persons on a regular basis.

[This Article Wholly Amended by Act No. 8815, Dec. 27, 2007]

Article 27 (Composition of Grievance Handling Committee and Term of Office)

(1) A grievance handling committee shall be composed of not more than three members representing labor and management, and for business or a workplace where a council is established, the council shall elect such members from among its members and for business or a workplace where no council is established, the employer shall commission them.

(2) Article 8 stipulating the term of office of council members shall apply mutatis mutandis to the term of office of grievance handling committee members.

[This Article Wholly Amended by Act No. 8815, Dec. 27, 2007]

Article 28 (Grievance Handling)

(1) Upon hearing from a worker about grievances, a grievance handling committee shall notify the worker concerned of the contents of any measure taken and other results of handling within ten days from the date of hearing.

(2) Any matter shall, if deemed difficult for a grievance handling committee to deal with, be referred to a council for settlement through consultation.

[This Article Wholly Amended by Act No. 8815, Dec. 27, 2007]

harassment on the job.”³⁵ According to this act, “sexual harassment on the job” occurs when an employer, a superior, or a worker causes another worker to feel sexual humiliation or a repulsion through the use of sexual words or actions, or by utilizing a position within a workplace or in relation to duties, or by providing any disadvantages in employment on account of sexual words or actions or any other demands (Article 2 (2)). Furthermore, no employer, superior, or worker shall commit any sexual harassment on the job against another worker (Article 12), and the employers shall, where they or their employees have committed sexual harassment in violation of Article 12, be punished by a fine for negligence, not to exceed 10 million KRW (Article 39). Moreover, this act stipulates that the employer should take measures with regards to sexual harassment (Article 13.14), including the training of employees in the preventive education of sexual harassment on the job (Article 13), the development of measures to be taken in the event of sexual harassment on the job (Article 14), and the prevention of sexual discrimination by clients, etc. (Article 14-2). Finally, an the employer will be punished by a fine for negligence, not to exceed five million KRW, in violation of Article 14 (1) and Article 14-2.

The Act on the Prohibition of Discrimination of Disabled Persons: Remedy Against Infringement on Their Rights, etc. also provides a definition of harassment. According to this act, harassment is physical, mental, emotional, or verbal acts committed against a disabled person in the form of organized exclusion, neglect, abandonment, aggravation, harassment, abuse, monetary extortion, and infringement of sexual self-determination (Article 3 (20)). Furthermore, disabled persons who have suffered from harassment shall have the right to receive counseling, treatment, legal aid, and other appropriate measures and shall not receive any disadvantageous treatment on the grounds of reporting harms caused by harassment (Article 32 (2)).

While it is not directly related to employment, the Welfare of the Aged Act has regulations on sexual violence or harassment that cause a sense of sexual shame to the aged (Article 39-9 (2)), and the Child Welfare Act also includes regulations against making a child feel sexually ashamed, as through sexual harassment and violence (Article 29 (2)). There are no penal provisions concerning the violation of the Welfare of the Aged Act, but in the Child Welfare Act, any person who violates the provisions of Article 29 shall be punished by imprisonment for not more than five years or a fine not to exceed 30 million KRW (Article 40).

The Equal Employment Opportunity and Work-Family Balance Assistance Act, the Act on the Prohibition of Discrimination of Disabled Persons: Remedy Against

³⁵ In addition to this, the Framework Act on Women’s Development and the National Human Rights Commission Act stipulate on sexual harassment.

FRAMEWORK ACT ON WOMEN’S DEVELOPMENT

Article 3 (Definitions)

4. The term “sexual harassment” means a case in which any employee, employer or worker of State agencies, local governments or public organizations prescribed by Presidential Decree (hereinafter referred to as “State agencies, etc.”) commits an act falling under any one of the following items in performing duties, employment and other relations: (a) Making the other party feel sexual humiliation or aversion with verbal or physical behavior of a sexual nature, etc. utilizing position or in relation with duties; and (b) Putting the other party at a disadvantage in employment on grounds of not complying with any verbal or physical behavior of a sexual nature or other demands, etc.

NATIONAL HUMAN RIGHTS COMMISSION ACT

Article 2 (Definitions)

5. The term “sexual harassment” means that the working persons, employers or employees of a public agency make others feel sexually humiliated or loathsome by their sexual comments, etc. or giving others disadvantage in the employment on the pretext of disobedience to sexual comments, other demands, etc., by taking full advantage of their superior position or with regard to the duties, etc.

Infringement on Their Rights, etc., and the Welfare of the Aged Act all regulate harassment in terms of sex, disability, and age. However, these regulations cannot function as general laws because they do not cover all types of harassment in the Korean workplace or the concept of bullying. This is why the Roh Moo-Hyun administration tried to propose the pre-announcement of legislation on an anti-discrimination law in 2007. In that proposal, there was a definition of bullying: the act that inflicts physical pain or mental pain, such as humiliation, insult, fear, etc., toward an individual or group. Yet, the proposed law did not have a regulation specific to bullying and harassment at work. Furthermore, this law was practically scrapped when a new regime came to power in 2008.³⁶

4.2 The responsibility for bullying and harassment in the workplace³⁷

In a sense, mobbing hinders the free expression of workers' personalities in the workplace, potentially infringing on personality rights. However, since the illegality of subjects is traditionally assessed based on the concrete actions of individuals, legally judging social problems that occur outside the legal system is not easy. Nevertheless, mobbing cannot be left unattended simply because the implementation of laws concerning that social problem will be difficult. In particular, because mobbing violates the worker's body and health, it is against the principle of constitutionalism.

Legal remedies for bullying and harassment in the workplace may be largely divided into civil and criminal legal responsibilities and responsibilities under the labor law. However, in this paper, the responsibilities of the related parties and the responsibilities under the labor law will mainly be examined.

4.2.1 The inflictors' responsibilities

Inflictors of bullying or harassment can be business owners, corporate representatives, superiors, or workers. Unless the inflictors of bullying or harassment are business owners, no contractual relations exist between inflictors and victims; thus, the inflictors' responsibilities become the responsibilities for torts under Article 750 or 751 of the civil law. That is, if the victims' personality rights or rights of labor are infringed upon because of the inflictors' bullying or harassment, the victims may request for compensation for losses for the reason of illegal acts.

4.2.2 The employers' responsibility

This applies to cases where business owners are the ones bullying or harassing others and cases where colleagues, corporate representatives, or superiors bully or harass someone. In cases where business owners are directly responsible for the bullying or harassment, they will have to compensate for the victims' loss or for defaulting on their obligation to consider safety under their labor contracts. Even if business owners are not directly responsible for the bullying or harassment, they shall bear the consequent responsibilities.

(1) The business owners' responsibilities under Article 750 or 751

In cases where business owners are directly responsible for bullying or harassment,

³⁶ Lee, J.H. (2009). A Study on Workplace Mobbing. Korea University (master's thesis), 110.

³⁷ Kim, Y.M. (1998). Legal Remedy for Workplace Mobbing. *Lawyers Association Journal*, 498 ; Lee, J.H. (2009). A Study on Workplace Mobbing. Korea University (master's thesis) ; Lee, D. H. (2011). Employee's Mobbing at the Workplace. *Chung-Ang Law Review*, 13(4) ; Shim, J.J. (2012). Regulating Harassment in the Workplace: The Case of the United Kingdom. *Korean Society of Comparison Labor Law*, 25.

they shall bear the responsibilities for not creating a workplace environment where workers' lives or health would not be damaged in the course of providing labor. In addition, business owners have the duty to consider the maintenance of a workplace environment where workers can work free of occurrences that cause serious inconvenience to the provision of labor due to the infringement of the workers' personal dignity in the performance of work. Impeding workers' abilities to cope with the performance of work, including the infliction of bullying or harassment, violated this duty. Thus, the violating business owners are subject to Article 750 of the Korean civil law.

In cases where business owners are corporations, responsibilities for illegal acts consist of the following: First, the business owners shall bear responsibilities under Article 756 of the civil law for employees' illegal acts. Second, the business owners may bear responsibilities under Article 35 of the civil law for representatives' acts. Clause 1 of Article 35 of the civil law specifies: "Corporations have the responsibility to compensate for losses inflicted by directors or other representatives to others in relation to their jobs." Since mobbing is an infliction "in relation to" the victims' job, the issue falls under article 35 of the civil law.

In the case of an individual business, if superiors or colleagues bully or harass the victim(s), and the victim(s) notifies the business owner of this fact, but the bullying or harassment continues, the business owner's responsibilities for illegal acts by nonfeasance can also be considered. That is, if a business owner instigates or abets in bullying or harassment, he/she shall bear responsibilities for joint illegal acts (clause 3 of Article 760 of the civil law).

(2) The business owners' responsibilities under articles 756 and 760

In cases where supervisors appointed by business owners bully or harass those under their supervision, and if business owners do not take immediate and appropriate actions when they know or could have known about the problem, the business owners shall also bear the responsibilities (Article 756 of the civil law) because they did not take reasonable care in appointing and supervising the supervisors. Reasons for exemption from these employers' responsibilities are: first, that employers took all necessary actions to prevent bullying or harassment, such as implementing education and making sufficient efforts to prevent mobbing; second, that employers made efforts to quickly correct employees when bullying or harassment occurred; and third, that employees did not use opportunities provided by employers to prevent bullying or harassment, and did not make an effort to avoid damages. If evidence for these factors can be presented, the business owner can be exempted from the employers' responsibilities.

(3) The business owners' responsibilities under contracts

In cases where business owners are directly responsible for bullying or harassment, they bear the responsibilities under contracts for violation of the obligation to protect workers, the obligation to consider workplace safety, or the obligation for equal treatment under labor contracts. In cases where business owners are not directly responsible for bullying or harassment, they still have the obligation to protect workers from the bullying or harassment of superiors or other workers. Therefore, when a worker has been afflicted with bullying or harassment from corporate representatives, superiors, or colleagues, the business owner still violated the obligation to protect workers, the obligation to consider workplace safety, or the obligation for equal treatment under labor contracts. Consequently,

the business owner shall bear the responsibility for compensation for losses when defaulting on those obligations. For instance, if a worker reports difficulties to the business owner, but the owner does not take appropriate actions, the lack of appropriate actions constitutes a violation of the obligation to consider workplace safety.

If a business owner does not know about a case of bullying or harassment because the afflicted worker did not declare the fact and the inflictor's bullying or harassment was conducted in secret, it cannot be said that the employer failed to perform his obligation to protect the victim under the employment contract.

4.2.3 The responsibilities under the labor law

The labor law of Korea does not have any direct legal provisions regarding mobbing, bullying or harassment at the workplace. There is only a provision regarding sexual harassment in the Equal Employment Opportunity and Work-Family Balance Assistance Act. Therefore, it is questionable if bullying and harassment-related issues can be coordinated with the provisions regarding sexual harassment. If the provision under the Equal Employment Opportunity and Work-Family Balance Assistance Act are applicable, then education for prevention should be implemented for mobbing, as it is for the prevention of sexual harassment (Article 13). Likewise, disciplinary actions or other equivalent actions should be taken against those who bully or harass others, as with the actions taken against those who sexually harass others (Article 14). Additionally, unfavorable actions should not be taken against workers who are victims of bullying or harassment. Finally, the issue of whether mobbing in the workplace falls under the category of discrimination should also be considered because workers may not be discriminated against without reasonable cause, thanks to Article 6 of the Labor Standard Act of Korea, which specifies equal treatment. This is a concretization of the principle of equal rights under the constitution.

(1) The issue of applying the Equal Employment Opportunity and Work-Family Balance Assistance Act

Article 12 of the Equal Employment Opportunity and Work-Family Balance Assistance Act specifies: "Business owners, superiors, or workers should not conduct sexual harassment in the workplace." Whether this provision can be interpreted as a general warning against bullying or other forms of harassment is at issue here. If such an interpretation is possible, the provision under the Equal Employment Opportunity and Work-Family Balance Assistance Act would be applied to bullying at work. In this respect, the relationship between bullying and sexual harassment should be examined. In general, it can be said that bullying causes harassment. If harassment occurs in relation to sex, it becomes sexual harassment, and if it occurs due to bullying, it becomes moral harassment. Essentially, sexual harassment can be said to be one type of harassment. Yet, it cannot be said that sexual harassment is included in bullying. That is, the provision for sexual harassment is not to be interpreted as a general provision for bullying.

(2) The issue of applying equal treatment under the Labor Standard Act

Since Article 6 of the Labor Standard Act of Korea has a provision for equal treatment, workers may not be discriminated against without reasonable cause. In the business setting, discrimination means the unfair provision of different employment or labor conditions to different workers or to take other unfavorable actions without reasonable cause (see the first clause of Article 2 of the Equal Employment Opportunity and Work-Family Balance

Assistance Act).

Whether the bullying or harassment of workers falls under the category discrimination should be examined. Since the bullying or harassment of workers appears as a deterioration of labor conditions for the affected workers, the bullying or harassment of workers can be said to be discrimination. Therefore, the provision under Article 6 of the Labor Standard Act applies to discrimination.

5. Implications for bullying and harassment cases

In this chapter, I will introduce four bullying cases that actually occurred in the workplace. All information was provided by Mr. Ahn and Mr. Lee.

[Case 1]

When the sales department and the finance department dined together, Kim (male), the chief of sales, told his subordinates: “Do not toast deputy chief Park (female) of the sales department who has ignored our department.” Yang, the chief of another department, said, “I am not a sales department member, so is it alright if I toast Park?” When Yang attempted to toast Park, Kim got angry and said: “You do not toast her.”

At the time, other employees felt sorry for Park, but no one dared to stop Kim because he was the senior member among them. Kim’s exclusion of Park in front of many employees caused Park to feel shame and a sense of indignity.

[Case 2]

Jeong (female), a sales representative, underwent surgery in 2011 due to a chronic disease, and she had a hard time recovering from its sequela. Because Ryu (male), the team manager and Jeong’s immediate superior, knew that many sales occurred in Jeong’s area at the end of every month, he telephoned Jeong continuously and threatened her: “I am not interested in your circumstances. Will you be able to make your sales in this way? I will wait and see how well you do during the remaining 10 days.”

Such harsh language and threats were obviously inappropriate for a team manager. Ryu could not control his temper, satisfying his resentment of Jeong. Every month, he did the same thing, and Jeong was under severe stress, lapsing into a depression.

[Case 3]

Shim, a 26-year-old (female) employee of C company was under severe mental stress due to continuous bullying by deputy chief Lee, a female in her early 40s. Lee was unmarried, and she satisfied her resentment by continuously harassing her subordinate, Shim. For instance, Lee imposed a lot of work on Shim late on Friday afternoons, saying: "Have the finished work on my desk by the time I come in Monday." Likewise, Lee would have Shim do her translation assignments for graduate school, even though the assignments were Lee's personal work.

After nine months of being bullied, Shim could not tell Lee (who had power over Shim's performance rating) that the stress was causing her to suffer from sitomania. Shim, a young unmarried woman, rapidly gained weight and lost confidence in her appearance. Finally, she made a rash decision. On a Friday night, she e-mailed her foreign CEO, declaring: "I will hang myself at the office during the weekend, and when you come to the office, photograph me and place the image on Lee's desk for harassing me." Fortunately, the CEO read the e-mail that night, immediately contacting Shim and listening to her plight. In the end, he persuaded her not to commit suicide with a promise to prevent such harassment in the workplace.

[Case 4]

Park (male) of D company was eager to be in shape. He always ate chicken breasts and egg whites. Consequently, an odor of rotting egg lingered around him.

Park himself did not realize it, but even though he brushed his teeth well, the egg smell from his mouth was so evident that other employees gradually did not want to eat or talk with him. In particular, female employees did not go near him because of the smell. Yet, Park was very proud of himself, and he did not leave the company or try to resolve the problem. Eventually, other employees did not want to do projects with Park, needing their immediate superior to demand their cooperation. Ultimately, the progress on the tasks was never smooth, the results were unsatisfactory, and Park's low performance rating kept him from being promoted. He left the company voluntarily.

According to Lee,³⁸ the causes of bullying at the workplace include arrogance, rudeness, ostentation, ignorance of customs, job capabilities, appearance, disease, and disorder in victims, and jealousy, competition, concealment of self-display, the display of authority or capability, and anger in the inflictors. As a result, this triggers: degraded job involvement, frustration, depression, physical disorder, and job transfers on an individual level; and weakened organizational solidarity, the destruction of organizational culture, decreased productivity, and a weakened public image on an organizational level.

As the four cases above show, there are diverse causes of bullying in the workplace,

³⁸ Lee, J.H. (2012a). The Problem and Organization Management of Workplace Mobbing. *Management World*, 393, 43-44.

and they may not be objectified. In particular, the fourth case shows that the victims and the inflictors may not be clearly differentiated. This is why it is difficult to resolve such cases of bullying; the roles are not always obvious, and there is a tendency to regard it as a matter of personal problems.

According to the “Measures to Prevent Mobbing in Workplaces,” bullying may start out as a bit of fun, secretly being committed under implied consent, but it has real ramifications for the individuals who constitute the group dynamics of an organization. The workplace involves relationships between individuals and groups; therefore, it is hard for the individual to respond to mobbing. And if the person requests help from outside the group, he/she may be misunderstood as lacking in organizational adaptability or job capabilities, and may be subject to disadvantages.³⁹

As the above cases show, bullying colleagues is in direct violation of the law, but there are more cases where it is not illegal. For example, employees that merely do not get along and do talk with their colleague are not violating the law. Hence, the relative degree of intimacy in interpersonal relationship is not a domain that is usually a matter of legal concern.⁴⁰

In the first and fourth cases, amid bullying of a person other employees just see how the wind blows or become silent sympathizers, weakening organizational solidarity and negatively affecting tasks.

Even though, in the third case, the CEO acted on the victim’s situation immediately and prevented further harm from occurring, this is not usually the case. In terms of mental health as a result of workplace bullying, if victims try to file insurance claims for depression, the company views them negatively. In other words, when a victim applies for the insurance, the company should be under investigation of labor inspectors and the company is put into a difficult situation. Therefore, victims find it difficult to seek help through the company for mental health issues.⁴¹

6. Actions and limitations of companies, labor unions, and the labor relations commission

6.1 The company’s self-helping measures

We have investigated the legal responsibilities of companies (and the measures they can take) when workplace bullying and harassment occur. However, when the problems actually happen, many employers, at first, consider firing the victims.⁴² Conversely, when workplace bullying and harassment occur, the victims might consider suicide, applying for compensation, or leaving the company. Thus, the consequences of workplace bullying and harassment damage a company’s reputation and its investment in human resources.

The following are the actions that companies are taking to prevent or handle bullying and harassment at the workplace:

³⁹ Weekly Dong-A, 2000.6.1.

⁴⁰ Lee, J.H. (2012b). Legal Approach to Workplace Mobbing. *KEF Compensation Quarterly*, 20(1), 99-100.

⁴¹ Interview with Mr. Ahn.

⁴² Interview with Mr. Lee.

- * To open the window for communication, using messages or e-mail to inform the CEO or superiors in the management department of problems at work;
- * To employ a professional counselor or doctor in the health center of the company or the hospitals affiliated with the company (in the case of some major companies);
- * To appoint a confidence worker to communicate with others who have had some difficulties with bullying or harassment; and
- * To understand if teams are working well or not. Those assessments will reflect on the head of the applicable department, and the unification of the each department will be encouraged.

Some companies have thus taken actions to prevent workplace bullying and harassment. Yet, there are no regulations, legislations, or even guidelines from related to government agencies to encourage or enforce further actions. The actions that have been taken originated from company initiatives.

The companies that already suffered from those problems or anticipate their occurrence have considered how they can take prevention measures. However, according to Mr. Lee, when a company seeks his advice in handling bullying or harassment, most companies decline his advice to place a doctor or psychotherapist for victim counseling at the workplace, preferring to let the victims have a face-to-face talk with the boss.

Moreover, despite the money and time invested in mandatory preventive education for sexual harassment, the reality is that the preventive education is conducted as a mere formality and has no effect to alleviate sexual harassment. This situation is similar to the preventive education for workplace bullying and harassment.⁴³

The action that most employers take in situations of workplace bullying and harassment is to make the victims leave the company. The victims are usually regarded as misfits within the organization who struggle with personal difficulties. As a result, many victims voluntarily resign, and the problems related to workplace bullying or harassment remain unexposed. Yet, if companies aggressively intervene to settle these situations, firing both bullies and victims or urging them to resign, it would put a different complexion on the matter, sometimes causing unfair dismissal controversies.⁴⁴

Therefore, companies need to change their perceptions of workplace bullying and harassment. When the employers understand that it is occurring at their workplace, they need to make the bullies and victims undergo an official grievance procedure, and they need to support the victims in receiving psychological counseling. Through these methods, the employers facilitate the mending of relations and support the victims in returning to their original duties.

If, despite all these efforts, it is still impossible to mend the situation, the employers could allow the victims to change their posting or to transfer to a different section. Finally, if the employers need to dismiss the victims or to advise them to resign, the employers need to be prepared for unfair dismissal problems by having procedures in place to explain the circumstances and the necessary actions they took.⁴⁵

⁴³ Interview with Mr. Lee.

⁴⁴ Lee, J.H. (2012a). The Problem and Organization Management of Workplace Mobbing. *Management World*, 393,45.

⁴⁵ Lee, J.H. (2012a). The Problem and Organization Management of Workplace Mobbing. *Management World*, 393,45.

6.2 The situations of labor unions and the labor relations commission

As with the case of the Seoul Metropolitan Subway Corporation in 1999, workplace mobbing occurs among members of labor unions. In Korea, most labor union members are often bullies in the workplace.⁴⁶ Labor unions primarily consist of workers, and the workers who can exercise their right to speak or have strong influence in their organizations tend to be bullies of workplace mobbing. Furthermore, one of the characteristics in Korean labor unions is a plethora of diverse factions or affiliations. Usually the antagonistic relations between these factions lead to workplace mobbing. For instance, the majority of faction mobs monitor faction members. Moreover, when union members gather for industrial actions, some members who oppose the leadership's policy or pursue their own lines of action will be the targets of workplace mobbing. For instance, the mobbing union members do not share communal activities with the victims, and they do not share information and personal connections.

Neither the Federation of Korean Trade Unions (FKTU) nor the Korean Confederation of Trade Unions (KCTU) has much interest in workplace bullying issues. FKTU and KCTU are the heads of prominent labor unions, and their main role is to manage on-site organizations. Yet, even union labor members at the on-site level usually do not have any interests in workplace bullying issues. Thus, FKTU and KCTU also do not present their interests about the workplace bullying and harassment issues.⁴⁷

Ideally, the labor unions should help to solve workplace bullying problems. However, in light of the current situation among Korean labor unions, it might be difficult for them to be the main solution. For instance, according to the Act on the Promotion of Workers' Participation and Cooperation, a grievance handling committee could be organized to hear the workers' grievances. The committee would be composed of not more than three members representing labor and management. Yet, the problem is that the union head would be a member of the committee, so the victims of workplace mobbing who would like to use this kind of committee would not get a fair hearing.⁴⁸

Regarding the role of the Labor Relations Commission (LRC), The LRC is a consensus-based administrative body composed of tripartite representatives of employees, employers, and public interest committees. The LRC is an independent, quasi-judicial body that concentrates mainly on mediating and adjudicating labor disputes between labor and management regarding interests and rights. The LRC also has the function of adjudicating unfair labor practices and unfair dismissals and of ordering the correction of discrimination for non-regular workers. Under the current the LRC system, however, workplace bullying and harassment problems are difficult to be handled in the LRC, and the industrial accident issues are also not be dealt with in the LRC.

7. Conclusions

It is necessary to change the way we understand workplace bullying and harassment in Korea, enhancing publicity on the issue, improving the legal regime related to it, and increasing the interests of civil or voluntary organizations. Although many legal experts

⁴⁶ Interviews with Mr. Ahn and Mr. Lee ; Lee, J.H. (2012b). Legal Approach to Workplace Mobbing. *KEF Compensation Quarterly*, 20(1), 101.

⁴⁷ Interviews with Mr. Ahn and Mr. Lee.

⁴⁸ Interviews with Mr. Lee.

perceive the significance of bullying and harassment issues at work, they sometimes find it difficult to pinpoint the legal issue, to objectify it, or to achieve a regulatory format. They conclude by saying that the bullying or harassment problems mainly involve emotional or personal aspects. However, the specific issue of sexual harassment came to the fore when a supervisor sexually harassed a female research assistance in 1993. In 1998, the Supreme Court of Korea determined the professor's liability in compensating for the sexual harassment.⁴⁹ Before then, victims who were sexually harassed at the workplace would silently leave the company to settle the issue. However, from the beginning of the incident in 1993, the issue of sexual harassment started to be publicized; thus, the current legislation stipulates general regulations on sexual harassment, including workplace sexual harassment, and the government is taking active measures to deal with it. Thus, when compared to ten years ago, sexual harassment problems have been publically acknowledged and concrete plans for correction have been implemented.

The two experts interviewed for this paper have pointed out that the current level of discussion regarding workplace bullying and harassment in Korea is similar to the level of discussion concerning sexual harassment in Korea ten years ago. Therefore, these workplace issues need to be classified and relevant judicial precedents need to be accumulated. The problem is that the number of precedents on workplace bullying and harassment is very small. Furthermore, we could consider mental health problems that workplace bullying and harassment cause. Yet, Korea is a place where the victims are reluctant to apply for compensation or to receive psychotherapy, so it is difficult to publicize the issues.

To solve the problems of workplace bullying and harassment, we anticipate the role of voluntary organizations. Concerning sexual harassment, many civil or voluntary organizations, labor unions where they have some interests on or relations to female workers or issues are actively being involved in sexual harassment issues. However, there remains a relative absence of voluntary organizations for the elimination of workplace bullying and harassment. Therefore, enhancing the awareness on workplace bullying and harassment is a prerequisite for invigorating the role and action of voluntary organizations.

Since the Ministry of Employment and Labor announced the "Measures to Prevent Mobbing in Workplaces" in 1999, we have not seen any legislative action to regulate the problems of workplace bullying and harassment. Nevertheless, more and more diverse academics are taking an interest in the problem, especially legal scholars who are looking to foreign legislations for comparable remedies to regulate workplace bullying and harassment problems in Korea.

Most importantly, we need to learn from the former experiences the publicization and regulatory legislations concerning sexual harassment. Of course, many companies initially fought against those regulations, looking to discharge their responsibilities. Therefore, in order to avoid repeating the tensions, companies have to take a deep interest in their employees, taking steps to handle the problems in advance. As with the legislated preventive education for sexual harassment in the workplace, the pre-emptive, periodical use of preventive education would help to eliminate workplace bullying and harassment.

In contemporary Korean society, the idea of a lifelong workplace and the sense of belonging to a company have faded away. Under the global economic downturn, Korean companies have been trying to diversify their employees' working type for reduced

⁴⁹ Supreme Court Decision 95 Da 3953 Decided February 10, 1998 (대법원 1998.2.10 선고 95 다 3953 판결).

expenditures. Consequently, the ideas on ethical management and corporate social responsibility have been proliferating for several years. Hence, companies need to reconsider “the image of employees” that has developed through a workplace hampered by bullying and harassment and a new image that embraces employees for their diversity.

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SaramIn: http://www.saramin.co.kr/zf_user/ Scout: <http://www.scout.co.kr/>)
Statutes of The Republic of Korea: http://elaw.klri.re.kr/eng_service/main.do
The National Institute of The Korean Language: http://www.korean.go.kr/09_new/index.jsp

Workplace Bullying in Japan

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1. Introduction

Workplace bullying has been exposed much more as a social problem in recent years in Japan. It shall be explained in detail later, but if we look at a breakdown of labour counseling at prefectural Labour Bureaux, 6,627 (5.8%) of these cases were “bullying and harassment” in FY2002, but in FY2012 it had rapidly increased to 51,670 cases (17.0%), becoming the most common consultation for the first time.¹ And in courts and labour tribunals, cases related to workplace bullying are on the rise. Psychological injuries including suicide due to workplace bullying, which are determined as industrial accidents, are also increasing.

In response to this situation, the Government has started taking countermeasures. In July 2011, the Ministry of Health, Labour and Welfare (MHLW) set up the “Round-table Conference regarding Workplace Bullying and Harassment” (hereinafter “Round-table Conference”), which then launched the “Working Group for the Round-table Conference regarding Workplace Bullying and Harassment” (hereinafter “Working Group”). After repeated discussions, as commissioned by the Round-table Conference, the Working Group released a report on 30th January, 2012. In response, the Round-table Conference published its “Recommendations for Prevention and Resolution of Workplace Power Harassment”² on 15th March.

In this paper, I shall look at the general situation with regard to workplace bullying in Japan, specifically the current situation, the consequences and impacts (for companies, victims, colleagues), the background and reasons for the occurrence, the national policies, the intervention and prevention on the part of companies and trade unions, and the role and functioning of voluntary organizations.

2. Current situation with regard to workplace bullying

In Japan, there have ever been only two large scale nationwide surveys of employees regarding workplace bullying. One was conducted by the All-Japan Prefectural and Municipal Workers Union (JICHIRO) in 2010, the “100,000 Persons Power Harassment Survey” (hereinafter “JICHIRO Survey”).³ Another was conducted in 2012 by MHLW,

¹ Ministry of Health, Labour and Welfare, *Enforcement Status of Individual Labour Dispute Resolution System in FY2012* (released on 31st May, 2013).

² The words “Power Harassment” was created by a consultant Yasuko Okada in 2001. After that, it spread nationwide and has been used as words meaning workplace bullying and harassment.

³ A questionnaire was sent to 103,827 persons extracted from among JICHIRO members nationwide, and responses were collected from 62,243 persons (response rate: 59.9%). This survey targeted all employees including non-permanent

“Workplace Power Harassment Survey (employee survey)” (hereinafter “MHLW Survey”).⁴ This section provides an overview of the current situation with regard to workplace bullying in Japan, based on mainly these two surveys’ results.

2.1 Prevalence

I will start with prevalence (experiences) of workplace bullying, by gender, age, type of employment, occupation, organisational status, number of employees, and industry.

According to the MHLW Survey, 25.3% of all respondents experienced workplace bullying in the past three years. By gender, it was 26.5% of males and 23.9% of females, which showed a slightly higher percentage of male experienced bullying.

In the JICHIRO Survey, 21.9% experienced workplace bullying in the past three years (3.4% were seriously bullied). 10.6% were bullied more than three years ago. Thus the total percentage of workplace bullying victims was 32.5%, about one in every three persons. Viewed by gender, it is 19.8% of males (3.5% were seriously bullied), and 24.5% of females (3.2% were seriously bullied). The percentage is slightly higher for females.

According to a survey conducted by the Japan Institute for Labour Policy and Training (JILPT) on bullying conciliation cases in prefectural labour bureaux in FY2008 and 2011, 45.0% were males, 54.6% females and 0.4% unknown among the cases in 2008. Among the cases in 2011, 39.8% were males, 59.8% females and 0.4% unknown, thus higher percentages of female victims applied for the conciliation.⁵

If we look at the percentages of bullying victims in the past three years by age group, it was the highest in the 30-39 age group at 27.2%, 25.7% in the 40-49 age group, 24.8% in the 50 and older age group, and the lowest in the 20-29 age group at 23.3% in the MHLW Survey.

The percentages of male victims in the past three years by age group in the JICHIRO Survey were, in descending order, 20.8% in the 40-49 age group, 20.7% in the 30-39 age group, 18.3% in the 20-29 age group, 18.1% in the 50-59 age group, 10.6% in the 60 and older age group, and 7.2% in the 10-19 age group. 40-49 was the peak age group, with not much difference in the percentages from the 20s to 50s age groups which were around 20%. On the other hand, the percentages were low at around 10% in the 60 and older and 10-19 age groups. The percentages of female victims in decreasing order were 26.3% in the 40-49 age group, 25.3% in the 30-39 age group, 24.8% in the 50-59 age group, 21.8% in

employees. *JICHIRO, Power Harassment 10 mannin Jittai Chōsa Hōkokusho*, Chingin Shiryō No. 191 (November 2011).

⁴ MHLW survey (employee survey) was conducted online, targeting 10,075 persons consisting of (a) 9,000 persons extracted by random sampling from among male and female workers aged between 20 and 64 and employed at enterprises or organizations nationwide (excluding government employees, self-employed workers, enterprise managers and officers), and (b) 1,075 persons extracted as special samples from among workers who have experienced workplace bullying in the past three years. In random sampling, samples were assigned to the groups defined by gender, age, and employment status (permanent/non-permanent) based on the Employment Status Survey by MHLW, so that the sample structure would be close to the actual labour structure in Japan. MHLW, *Report of Workplace Power Harassment Survey* (December 2012).

⁵ Shino Naito, *Circumstances of Bullying/Harassment as Seen in the Cases of Conciliation by Labor Bureaux*. In the Japan Institute for Labour Policy and Training (JILPT), *Content Analysis of Individual Labor Dispute Resolution Cases—Termination, Bullying/Harassment, Reduction in Working Conditions, and Tripartite Labor Relationships—*, JILPT Research Report No. 123 (June 2010), which analysed the 260 conciliation cases concerning bullying dealt with by four labour bureaux in FY2008; and JILPT, *Shokuba no Ijime, Iyagarase, Power Harassment no Jittai—Kobetsu Rōdō Funsō Kaiketsu Seido ni okeru 2011 nendo no Assen Jian wo Taishō ni—* (Actual Situation of Workplace Bullying/Harassment—Focusing on Conciliation Cases in the Individual Labour Dispute Resolution System in FY2011—), forthcoming, which analyses the 284 conciliation cases concerning bullying dealt with by six labour bureaux in FY2011.

the 20-29 age group, 15.6% in the 60 and older age group, and 13.3% in the 10-19 age group. Similar to males, 40-49 was the peak age group, with the percentage of around 20% to 25 % in the 20s to 50s age groups. On the other hand, it was low at around 15% in the 60 and older and 10-19 age groups.

The JILPT Survey also shows that there is a greater tendency of bullying in the 30-39 and 40-49 age groups. In the bullying conciliation cases of 141 applicants which contained age information in documents in FY 2011, 32.9% of the cases were in the 40-49 age group, and 28.7% in the 30-39 age group, showing high percentages in the 30-39 and 40-49 age groups. On the contrary, the percentages were low at around 10% in the 50-59, 60 and older, and 20-29 age groups. Looking at the surveys done so far, it can be said that more workplace bullying victims are in the 30-39 and 40-49 age groups in Japan (Table 1).

Table 1: Number of bullying conciliation cases in labour bureaux (by age group)

	Number of workplace bullying cases	Percentage	Percentage if exclude unknown
10-19 age groups	1	0.4	0.7
20-29	16	5.7	11.2
30-39	41	14.4	28.7
40-49	47	16.5	32.9
50-59	19	6.7	13.3
60 & older	19	6.7	13.3
Unknown	141	49.6	
Total	284	100	100

Sources: JILPT survey which analysed the contents of 284 bullying conciliation cases dealt with by six Labour Bureaux in FY2011.

Regarding types of employment, 22.0% of permanent employees and 21.0% of non-permanent employees were bullying victims in the past three years in the JICHIRO Survey, showing no major difference in both percentages. But among the non-permanent employees, 31.2% of agency workers were victims, which is comparatively higher. JILPT Survey also indicates that, among the applicants of bullying conciliation cases in FY2011, agency workers were 8.5% of the all applicants, which exceeds their percentage of all workers nationwide (1.7%).

On the other hand, the result of the MHLW Survey shows that the percentages of victims were 26.8% of male permanent employees, 29.0% of female permanent employees, 20.9% of male non-permanent employees and 19.3% of female non-permanent employees. Thus, compared to non-permanent employees, greater percentages of both male and female permanent employees were bullied.

Looking by occupation in the MHLW Survey, there were no major differences between occupations. In the JICHIRO Survey, bullying was the highest in nursing at 32.0%, followed by childcare 25.0%, other medical care jobs 25.0%, and welfare jobs 23.2%. Compared to other jobs like clerical 20.1% or technical jobs 20.8%, it was higher in medical and welfare jobs.

By organisational status of people who experienced bullying in the past three years in

the MHLW Survey, it is higher in the managerial level at 31.1% than in non-managerial levels at 24.8%. The JICHRO Survey shows that there was no major difference between managers as a whole and non-managerial employees, but looking at a breakdown of managers, the percentages were 18.2% of assistant section managers, 20.8% of subsection chiefs, and 22.7% of chiefs. Thus the lower the rank in management, the higher the ratio of bullying.

Concerning experiences of workplace bullying by number of employees in organisations, the ratio was the highest at 27.4% in organisations with 100 to 299 employees, and lowest at 25.0% in organisations with 99 or less employees. This showed that a certain number of employees felt they were bullied regardless of the size of their organisations (MHLW Survey).

The MHLW Survey indicates that the prevalence of bullying by industry is similar at around 25 %. For example, the percentage of the financial and real estate industry was the highest at 27.6% and the lowest one was 23.3% in the wholesale/retail, restaurant and hotel industry.

In the JILPT Survey on bullying conciliation cases in FY2011, the largest number of cases (54) were in the medical and welfare industry (19.0% of the 284 cases in the survey), followed by 53 cases in the manufacturing industry (18.7%) and 44 cases in the wholesale and retail industry (15.5%). Considering that their percentages of all Japanese industries are 5.9% for the medical and welfare industry and 9.9% for the manufacturing industry (as of 2007), we may point out high prevalence in these two industries (however, since this survey covered people who suffered workplace bullying and applied to prefectural Labour Bureaux for conciliation, we need to keep in mind that it may not directly reflect the attributes of the victims of workplace bullying).

2.2 Consequences

Among the impacts of workplace bullying, with regard to those on mental health, survey conducted by Tsuno et al. showed that the risk of psychological stress reaction was 4 to 5 times higher and of onset of PTSD symptoms was 8 times higher in workplace bullying victims, compared to those who were not exposed to bullying, after controlling some factors like individual attributes, occupational attributes, and support of superiors and colleagues.⁶

Regarding the relationship between the experience of bullying and mental and physical health, the group which experienced workplace bullying showed damage of mental and physical QOL, especially impacts on the mental QOL is big. The result suggests that workplace bullying may negatively affect the mental well-being of the victims (Hyogo Institute for Traumatic Stress, 2012).⁷

Regarding the relationship between workplace bullying and work performance, a mild

⁶ This survey was conducted in 2009 on bullying among municipal employees (civil servants) of Kanto region. A questionnaire was sent to 4,702 persons who were members of labor unions in the Kanto region, and responses were collected from 2,194 persons (response rate: 46.7%). Kanami Tsuno, Tetsuya Morita, Akiomi Inoue, Kiyoko Abe and Norito Kawakami, "Rodosha ni okeru shokuba no ijime no sokutei houhou no kaihatsu to sono jittai kenkou eikyou ni kansuru chousa kenkyu," *Sangyo Igaku Journal (Occupational Health Journal)*, 34, 3, 2011, pp79-86.

⁷ This Survey was conducted by the Hyogo Institute for Traumatic Stress in January and February 2011 on workers in five private companies in Hyogo prefecture. A questionnaire was sent to 1,102 workers, and responses were collected from 739 persons (response rate: 67.1%). Kiyoshi Makita, Sayaka Yamamoto, Saeko Takada and Horoshi Kato, The relationship between workplace bullying and health-related QOL or Presenteeism, *Shinteki Trauma Kenkyu (Japanese Bulletin of Traumatic Stress Studies, Official Journal of Hyogo Institute for Traumatic Stress)*, 8, 2012, pp11-18.

correlation was found between bullying and three scales, which are time management, mental-interpersonal demands, and output demands. The more the exposure, the lower was the performance in these three aspects (Hyogo Institute for Traumatic Stress, 2011a).⁸ In another survey by the institute, work performance of the victims was lower than those who were not exposed to workplace bullying (Hyogo Institute for Traumatic Stress, 2011b).⁹

3. Background and reasons for the occurrence of workplace bullying

As the background or cause behind workplace bullying and harassment, “changing business environment and workplace environment” have generally been given in Japan. To be specific, they are factors such as “trend of pursuing results due to harsher competition, resulting from economic globalization,” “workplace has become to have no enough employees due to too much work volume of each person,” “managers have been pushed to achieve their own results, and it became difficult for them to give their individual subordinates suitable and appropriate advice,”¹⁰ “due to progress in information processing equipments, work has shifted to individual work units rather than team units,” “Like performance-based system, personnel management has become individualized, with harsher competition between employees” and “workers of various types of employment and working conditions work together,” etc.¹¹ Thus, these factors and their resulting weakening of human relations in the workplace can be considered as the background and causes of workplace bullying problems.

In the “Interview Survey on Employers and Trade Unions’ Measures against Workplace Bullying, Harassment, and Power Harassment” conducted by JILPT in 2011 at 33 employers and trade unions, when we asked them “What do you think are the background and causes behind occurrence of power harassment? (multiple answers),” the answers were as shown in Table 2.¹² The top 5 answers were “overwork and stress caused by staff cuts or too few staff,” “lack of workplace communication,” “results improvement pressure from employers or performance-based system,” “managers are too busy for their work to care about their subordinates” and “diverse types of employment.” This is not a result of quantitative survey; rather it is based on the feelings of people working on harassment in each organization. This result is backed by the background and cause often given for workplace bullying so far: “changing business environment and workplace

⁸ Kiyoshi Makita et al, “shokuba ni okeru harassment kouji no ninshiki ni tsuite no ishiki chosa,” short-term research in FY2010, on the survey, *supra note 7*.

⁹ This survey was conducted by the Hyogo Institute for Traumatic Stress in October and November 2011 on nurse staff of hospitals in Hyogo prefecture. A questionnaire was sent to 3,300 nurse staff, and responses were collected from 1,410 persons (response rate: 42.7%). Kiyoshi Makita et al, “shokuba ni okeru jisatsu risk to shokuba nai stress to no kanrensei,” short-term research in FY2011.

¹⁰ 21 Seiki Shyokugyou Zaidan (Japan Institute of Workers’ Evolution), *Shokuba ni okeru Power Harassment no Bōshi no tameni (For prevention of power harassment in the workplace)* (third edition, 2011), p 3.

¹¹ Bureau of Industrial and Labor Affairs, Tokyo Metropolitan Government, *Shokuba no Ijime—Hakken to Yobō no tameni— (To Find and prevent workplace bullying)* (2011), p 8.

¹² This survey was conducted from May to December 2011 by JILPT, holding interviews with 39 organisations (employers and trade unions) engaged in carrying out proactive measures to prevent and resolve harassment. The measures taken by 33 organisations (15 employers, 18 trade unions (11 enterprise unions, 6 industrial unions, and 1 craft union)) are recorded in the following report: JILPT, *Shokuba no Ijime Iyagarase Power Harassment Taisaku ni kansuru Rōshi Hearing Chōsa—Yobō Kaiketsu ni muketa Rōshi no Torikumi (Interview Survey on Employers and Trade Unions’ Measures against Workplace Bullying, Harassment, and Power Harassment: Challenge to Prevent and Resolve Harassment)*, JILPT Research Material Series No. 100 (April 2012).

environment.”

Besides, “changes in employees’ side” and “greater social awareness” were also given as the reasons for workplace bullying and harassment turning into a social problem.¹³ The former means that workers have less respect for the seniority system, so it is easier for them to complain, and workers have more diverse values. Another reason was sometimes pointed out that the modern workers have less stress tolerance.

Table 2: Background and causes of harassment

“What do you think could be backgrounds and causes of harassment?”

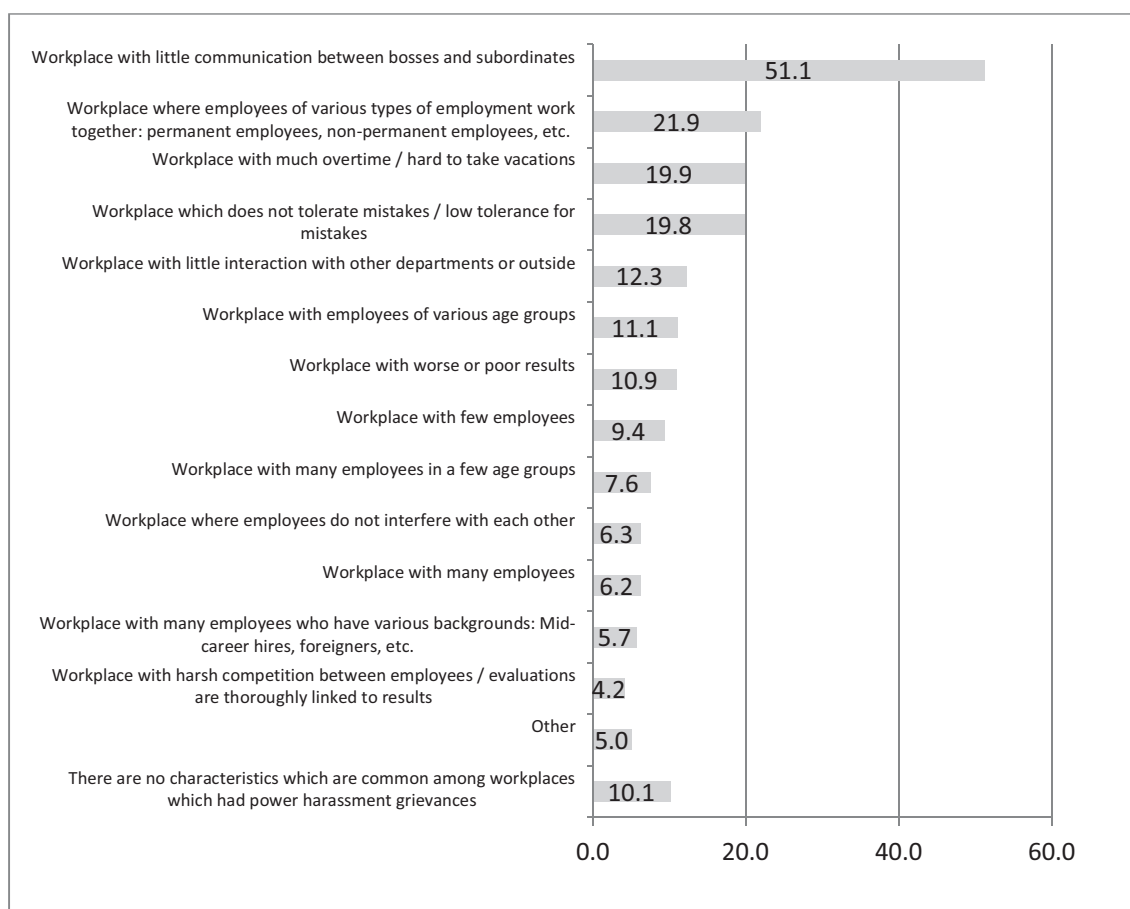
- Overwork and stress caused by staff cuts or too few staff
- Lack of workplace communication
- Results improvement pressure from employers or performance-based system
- Managers are too busy for their work to care about their subordinates
- Diverse types of employment
- Relationship similar to apprenticeship system unique to industry
- Business structure changes (resulting in personnel transfers) and changes of workplace environment
- Low wage structure of industry
- Weaker human relations and lack of trusting relations between bosses and subordinates, or between colleagues
- Personalities and lack of awareness of harassment on the side of bullies
- Lack of training for managers
- Weak awareness of human rights and respect for individual
- Disappearance of people in the workplace who helped to solve problems
- Less communication ability
- Weakening management abilities of managers
- Sense of right because pay money (when harassers are customers)

Sources: JILPT “Interview Survey on Employers and Trade Unions’ Measures Against Workplace Bullying, Harassment, and Power Harassment” (2011).

Also, the MHLW employer survey asks about characteristics of workplaces where workplace bullying occurs. Common characteristics of workplaces with grievances related to workplace bullying are: “workplace with little communication between bosses and subordinates” (most common at 51.1%), followed by “workplace where employees of various types of employment work together: permanent employees, non-permanent employees, etc.” (21.9%), “workplace with much overtime / hard to take vacations” (19.9%), “workplace which does not tolerate mistakes / low tolerance for mistakes” (19.8%) (Fig. 1).

¹³ Japan Institute of Workers’ Evolution, *supra note* 10, p. 3.

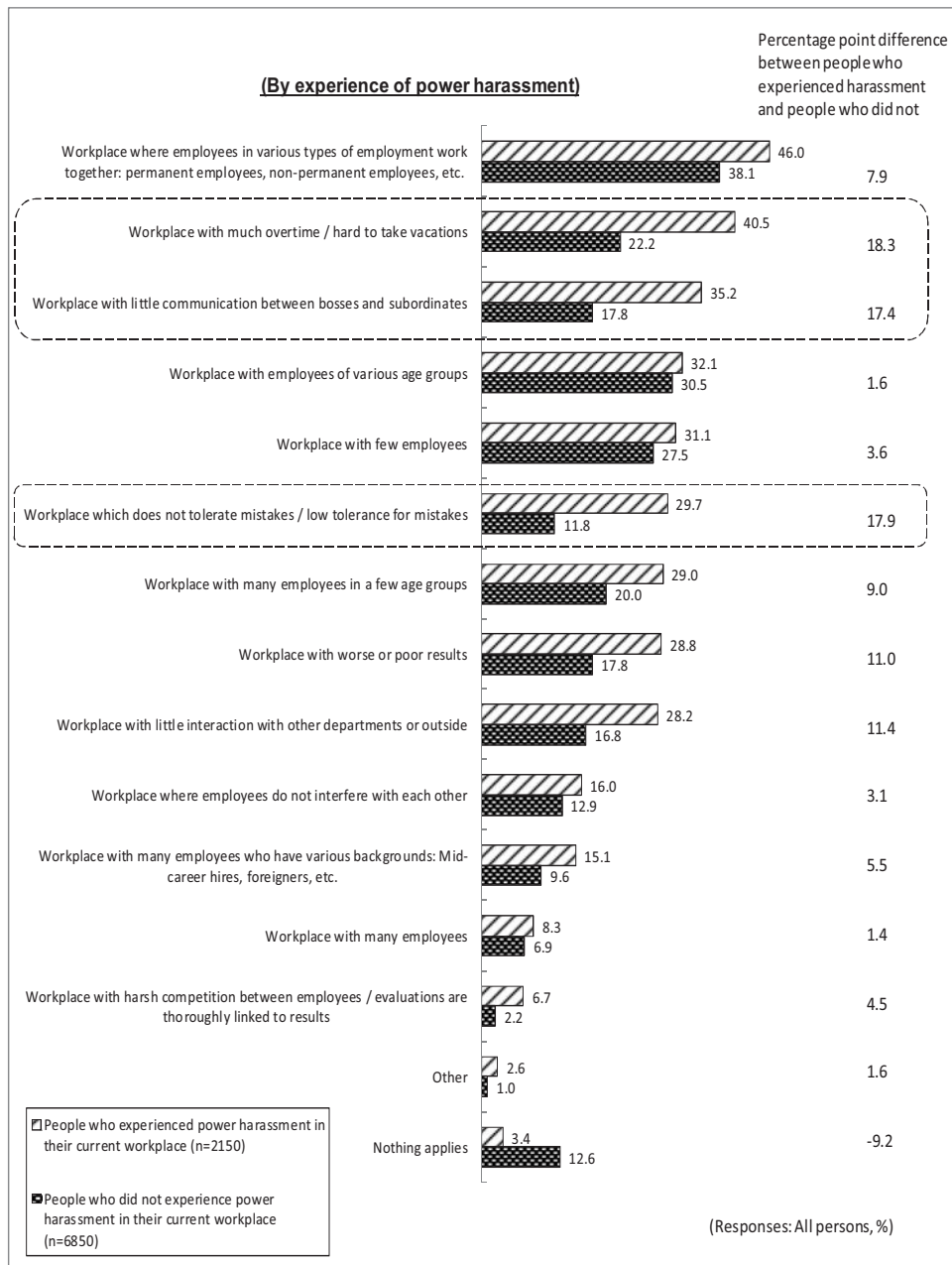
Fig. 1: Characteristics which are common among workplaces which had grievances on bullying



(Responses: Employers which had grievances on power harassment in past three years. n=1571, %)

Sources: MHLW Survey (employer survey) (December 2012).

On the other hand, the MHLW employee survey also compared people who suffered or saw workplace bullying in their current workplace in the past three years, with people who did not suffer nor saw workplace bullying in their current workplace in the past three years and sought characteristics of workplaces where bullying occurs. These are items chosen by large percentages of people who experienced bullying in their current workplace, and which have a large gap versus people who did not experience bullying: “workplace with much overtime / hard to take vacations” (40.5% of those who experienced bullying, 22.2% of those who did not experience bullying, difference of 18.3 percentage points), “workplace which does not tolerate mistakes / low tolerance for mistakes” (29.7% of those who experienced bullying, 11.8% of those who did not experience bullying, difference of 17.9 percentage points), “workplace with little communication between bosses and subordinates” (35.2% of those who experienced bullying, 17.8% of those who did not experience bullying, difference of 17.4 percentage points) (Fig. 2). Both the employer survey and employee survey show similar trends regarding characteristics of workplaces where bullying occurs.

Fig. 2: Workplace characteristics (by experience of power harassment)

Sources: MHLW Survey (employee survey) (December 2012).

The MHLW employee survey also has questions on the situation of workplace communication, which similarly compare people who experienced power harassment in the current workplace with those who did not experience it.

In response to the question as to whether “it is easy to communicate to my company that I feel worries, dissatisfaction or problems,” the total of “does not apply at all” plus “does not apply much” was 64.0% among people who experienced bullying, which is nearly double the 35.9% of people who did not experience bullying (Fig. 3). Similarly, in

response to the question as to whether “it is easy to communicate to my boss that I feel worries, dissatisfaction or problems,” the total of negative replies was 57.9% of people who experienced bullying, which is nearly double the 31.9% of people who did not experience bullying (Fig. 4).

On the other hand, a total 34.6% of victims of power harassment in their current workplace replied “does not apply at all” or “does not apply much” regarding the question about whether “There is smooth communication between colleagues,” and a total of 39.9% regarding the question about “I have a colleague with whom I can discuss issues other than work.” On the other hand, 36.0% gave affirmative replies of “Applies very much” or “Applies somewhat” for “There is smooth communication between colleagues,” and a total 37.5% gave affirmative replies for “I have a colleague with whom I can discuss issues other than work” (Fig. 5 and 6).

From these survey results, as a communication problem behind bullying, one can say that “ease of consulting with and talking with company and boss” is most important. Communication among colleagues seems to be next most important.

Fig. 3: It is easy to communicate to my company that I feel worries, dissatisfaction or problems.

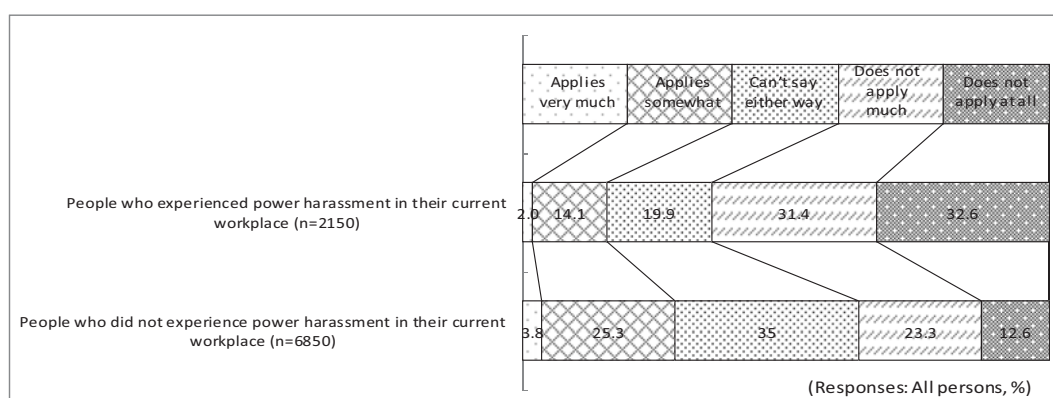


Fig. 4: It is easy to communicate to my boss that I feel worries, dissatisfaction or problems.

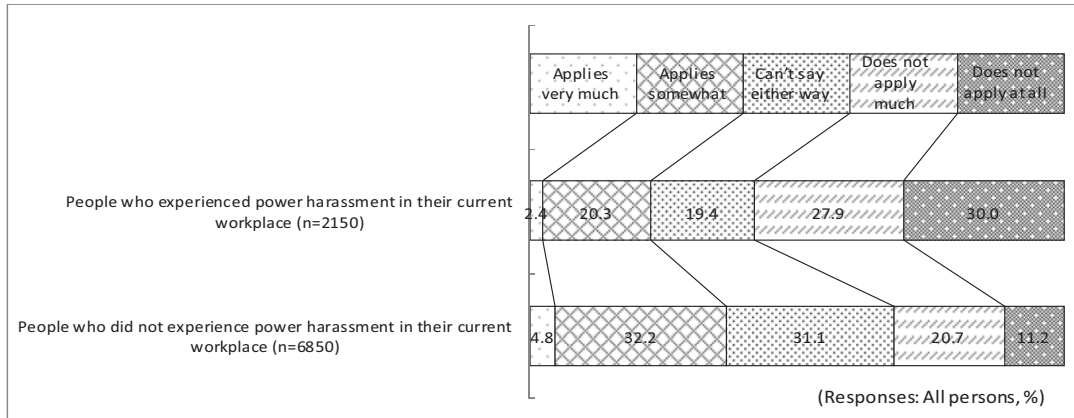


Fig. 5: There is smooth communication between colleagues.

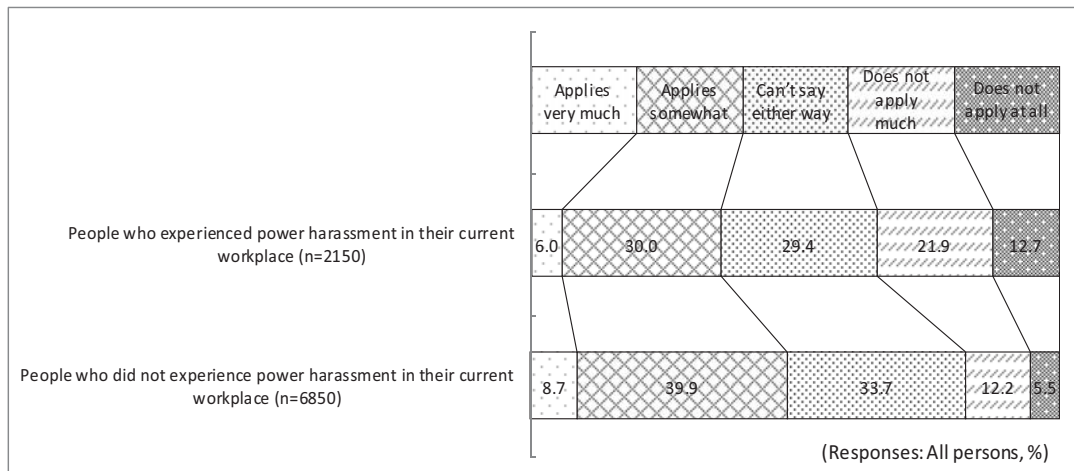
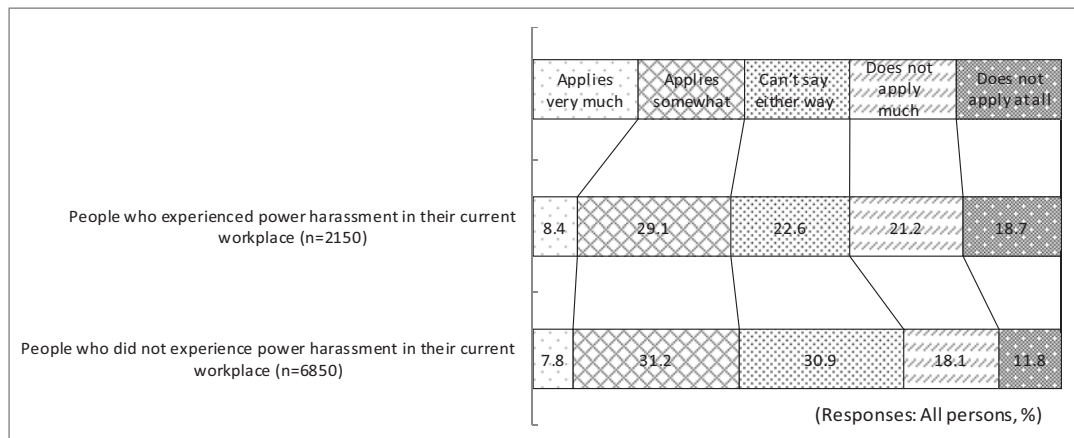


Fig. 6: I have a colleague with whom I can discuss issues other than work.



Sources (Figures 3 to 6): MHLW Survey (employee survey) (December 2012).

4. National policies on workplace bullying

4.1 Disputes on workplace bullying

Japan has no legislation specific to workplace bullying at this moment, but this does not mean that there are no disputes on workplace bullying.

As I wrote at the start, in the labour counseling at prefectural labour Bureaux, 6,627 (5.8%) of these cases were “bullying and harassment” in FY2002, but in 2012 it had rapidly increased to 51,670 cases (17.0%), becoming the most common consultation for the first time.¹⁴ Its rate of increase is 12.5%, the highest pace among all disputes in 2012.

When we look at consultation cases dealt with by the Tokyo Metropolitan Labor Consultation Center, the number of consultations related to “bullying and harassment” continued an increasing trend from 5,960 cases (6.4%) in FY2008 to 7,962 cases (7.9%) in 2012, although the total number of cases remains almost unchanged in the past five years.¹⁵

A questionnaire survey on those who have used the labour tribunals shows that 24.3% (73 respondents, multiple answers) of workers filed a complaint about “power harassment,” and 13.3% (40 respondents, multiple answers) about “bullying/harassment other than sexual harassment and power harassment.”¹⁶ It is clear that a considerable number of bullying and harassment cases have been handled not only by labour consultation of administrative bodies, but also by labour tribunals.

And it is a matter of course that the bullying and harassment cases that are brought to regular courts are also on the quick rise in recent years. Although exact number is unknown, nearly 100 cases on bullying have thus far been disputed in regular courts.

According to a survey on large companies conducted by the Japan Industrial Safety and Health Association (2005), 33% (69 companies) responded that they have faced power harassment and related issues, and 10% (21 companies) have dealt with them occasionally; revealing that power harassment has been occurred in 43% of companies.¹⁷

Another survey on companies (mostly large companies) (2010) indicates that 9.8% of surveyed companies responded that power harassment and related issues have at least doubled, and 44.8% of companies answered that the number of cases has increased although not doubled, indicating a staggering 54.6% of companies answered that the number of cases has increased.¹⁸

The recent MHLW Survey showed that 45.2% of the surveyed companies dealt with the issue of power harassment raised by employees during the past three years, and the average number of cases which those companies dealt with was 6.4 cases. As shown thus far, it is clear that cases of workplace bullying/harassment occur in a number of companies, and the number of cases is increasing in recent years.

Furthermore, among the cases with mental injuries which were determined as industrial accidents and compensation for workers was approved, the number of mental

¹⁴ *Supra note 1.*

¹⁵ Bureau of Industrial and Labor Affairs, Tokyo Metropolitan Government, Rōdō Sōdan oyobi Assen no Gaiyō (heisei 24 nendo) (Overview of labor consultation and conciliation (FY2012)) (April 2013).

¹⁶ The University of Tokyo Institute of Social Science, Rōdō Shinpan Seido ni tsuite no Ishiki Chōsa Kihon Hōkokusho (Basic report of the attitude survey on the labour tribunals system) (October 2011), p. 111.

¹⁷ Japan Industrial Safety and Health Association, Power Harassment no Jittai ni kansuru Chōsa Kenkyū Hōkokusho (Study report on the actual situation of power harassment) (March 2005), p. 13.

¹⁸ Power Harassment Study Group, cuorec3, Inc., Shokuba no Power Harassment Taisaku Torikumi Jōkyō ni kansuru Jittai Chōsa Hōkokusho (Survey report on the actual situation of the measures against power harassment in the workplace) (March 2011), p. 18.

injuries caused by “serious harassment, bullying or assault” increased as well: 16 cases in 2009, 39 cases in 2010, and 40 cases in 2011 (Table 3). Also increasing in recent years is the number of cases of mental injuries and suicide which were determined as industrial accidents, caused by “troubles with superiors, colleagues and subordinates”.

Table 3: Compensation as industrial accidents for workers with mental injuries

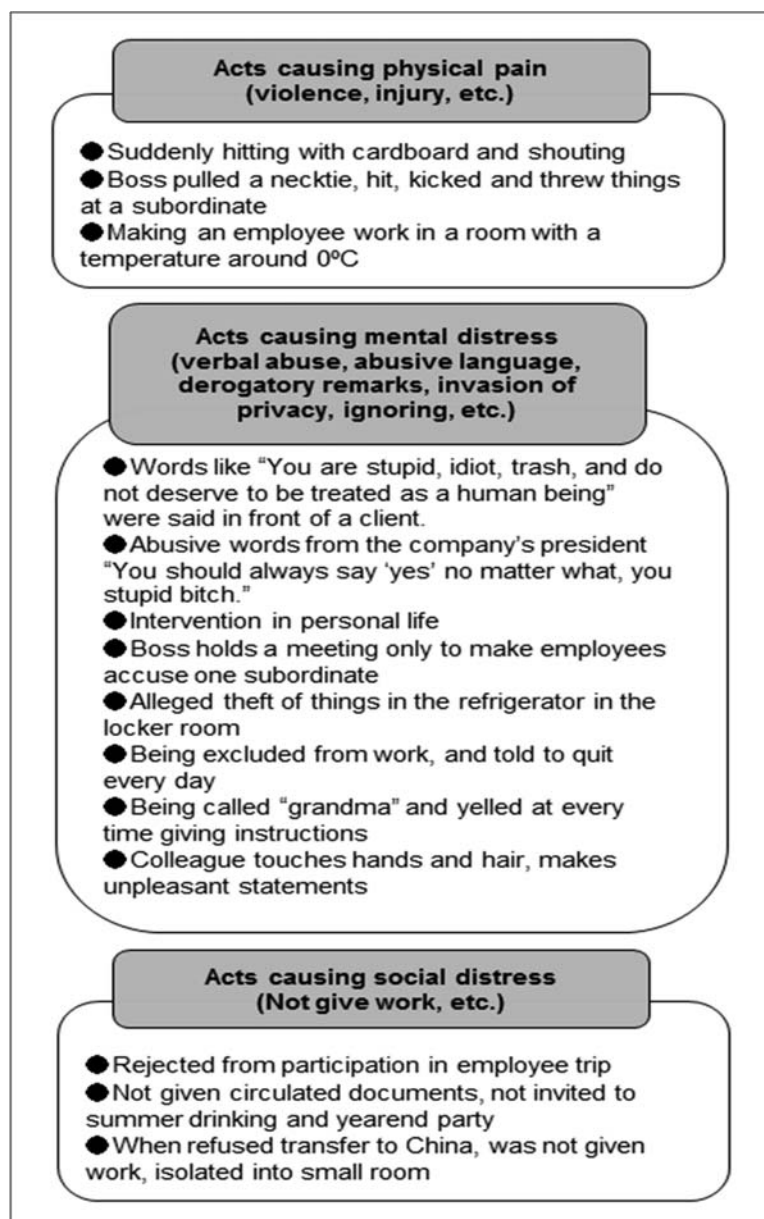
	FY2009	FY2010	FY2011
Number of applications for compensation as industrial accidents for workers with mental injuries	1136	1181	1272
Number of cases with compensation decision	234	308	325
Received (serious) harassment, bullying or assault	16 (of which 1 was suicide)	39 (of which 5 were suicide)	40 (of which 3 were suicide)
Trouble with superiors	9 (of which 1 was a suicide case)	17 (of which 2 were suicide)	16 (of which 4 were suicide)
Trouble with colleagues	0	0	2 (of which none were suicide)
Trouble with subordinates	0	1 (of which 1 was suicide)	2 (of which 1 was a suicide)

Sources: “Status of workers’ accident compensation for brain and heart diseases and mental injuries” FY2009-2011, MHLW.

Now, we turn our attention to what kind of bullying happens in the workplace. According the JILPT Survey which analyzed the bullying conciliation cases of FY2008, various kinds of bullying were reported from the applicants, including violence, injury, verbal abuse, abusive language, derogatory remarks, invasion of privacy, ignoring and exclusion from work.¹⁹ Actual behaviors are listed in Table 4.

¹⁹ Shino Naito, *supra note 5*, at 97.

Table 4: Bullying acts reported in conciliation cases dealt with by labour bureau



Source: JILPT, Content Analysis of Individual Labor Dispute Resolution Cases: Termination, Bullying/Harassment, Reduction in Working Conditions, and Tripartite Labor Relationships (JILPT Research Report No. 123, June 2010).

4.2 Measures of the Government

In response to this situation, the national government started taking countermeasures. As I mentioned in the beginning, MHLW established the "Round-table Conference" in July 2011 and the "Working Group" was launched by the Conference. After repeated discussions, Working Group put together a report in January, 2012 (hereinafter "Report"). Following the Report, the Round-table Conference published its "Recommendations for Prevention and Resolution of Workplace Power Harassment" (hereinafter "Recommendations") in March 2012.

Regarding the Round-table Conference, in the light of the situation where bullying/harassment cases in the workplace are on the rise, the Government set up it from July 2011 and March 2012, to hold discussions about approaches and measures for prevention and resolution of workplace bullying, participated in by the representatives of employers/employees, experts and government officials.

Commissioned by the Round-table Conference, the Working Group was established to clarify the points of issue, which was also participated in by the representatives of employers/employees, experts and government officials. The points of issue to be clarified by the Working Group were (1) the state of the issue and necessity of measures, (2) what kinds of behaviors should be prevented and resolved, (3) the ideal policies for this issue. The Working Group held six meetings to hear from experts and have discussions on three points of issue. It then put together the Report in January 2012. In response to this, the Round-table Conference published the Recommendations in March 2012.

4.2.1 Report by the Working Group

The Report compiled by the Working Group was to address the following issues raised by the Round-table Conference:

- 1) Why we should address workplace bullying/harassment problems (current situation of the problem, necessity/significance of addressing the problem and background of the problem)
- 2) What kind of acts should be eliminated from workplace (necessity of common recognition, categories of bullying) and
- 3) How we can eliminate power harassment from workplace (measures of employers and trade unions etc. for prevention and resolution)

(1) Necessity/significance of addressing the problem

The Report listed the following two points with respect to the necessity/significance of addressing the problem:

- (a) Bullying, harassment, and power harassment are unforgivable behaviors that deeply undermine the dignity and personality of workers, and
- (b) Such behavior inflicts a huge loss not only on the harassed person, but also on the people around him, the offender and the company.

With respect to the point (b) “loss,” the report requests companies to take proactive measures in order to prevent losses caused by bullying, harassment and power harassment at the workplace, such as decline in productivity and outflow of human resources, and in order to boost enthusiasm of the workers, increase productivity of the entire workplace and enhance vitality of the workplace, thus advocating active significance of efforts, not just aversion of losses.

(2) Definition of acts to be eliminated from the workplace

The words like “bullying/harassment” and “power harassment” mean different things to different people, so it is necessary to share the recognition among employers/trade unions and people concerned as to what kind of acts should be eliminated from workplace. Thus, the Working Group suggested that the following acts be called “workplace power harassment” and should be eliminated from the workplace, and that employers and trade unions should work together for prevention and resolution. The Working Group defines workplace power harassment as “an any act by a person using his/her superiority in the workplace, such as job position or human relationship with a co-worker, which causes such

co-worker mental distress or physical pain or a degradation of the working environment beyond the appropriate scope of business.”

In the definition of the “workplace power harassment,” the term “superiority” in the workplace is not limited to job position, but includes various superiority like human relationships or presence of expert knowledge; it includes any acts between seniors and juniors or between colleagues of equal standing or even from subordinates to superiors, not only typical acts from superiors to subordinates.

The definition of “workplace power harassment” identifies the scope of the concerned parties as a co-worker and it applies to any worker working in the same workplace, regardless of whether they are permanent or non-permanent employees (including agency workers). However, acts of a third party, such as a client or business partner, students and guardians, and patients and patients’ family, are not included in the definition of “workplace power harassment” in this Report. This is one of the main discussions in the meetings of the Working Group: to what extent should the scope of the concerned parties be broadened? (Whether a third party of a client/business partner etc should be included as a harasser?) Regrettably, such third parties were not included in this Report, but this is not to say that such acts by a third party are condoned. Rather, it should be interpreted that such acts have not included yet in this Report which is the first Government initiative against bullying in the workplace. As evidence to that, the report raises awareness by stating that “besides relations between employees in the same workplace, acts of clients or business partners may be occurred, which undermine the dignity and personality of an employee, based on their business power relationship.”

(3) Categories of power harassment

The Report by the Working Group categorizes power harassment in six categories based on the judicial precedents. However, these six categories do not cover all the real acts of workplace power harassment, and it is noted that some acts not in these six categories may also be considered power harassment.

- (i) Assault or injury (physical abuse)
- (ii) Intimidation, defamation, insult, or slander (mental abuse)
- (iii) Isolation, ostracization, or neglect (cutting off from human relationships)
- (iv) Forcing an employee to perform certain tasks which are clearly unnecessary for the business or impossible to be performed, or interrupting with their normal duties (excessive work demands)
- (v) Ordering an employee to perform menial tasks which need far below the employee’s ability or experience and not providing any work at all for an employee, without any business reasonableness. (insufficient work demands)
- (vi) Excessively inquiring into the private affairs of an employee (invasion of privacy)

It is often argued that it is difficult to draw the line between power harassment and business instructions, but employers and trade unions need to prevent and address the issue of any acts “beyond the appropriate scope of business” as defined in the earlier mentioned definition of “workplace power harassment.” Even if an individual employee feels dissatisfaction with an instruction, warning or guidance necessary for business, it does not fall into a category of “workplace power harassment” as long as such act is within the appropriate scope of business.

Then, the Report gives a guideline of “appropriate scope of business” for each of the

six categories. The “physical abuse” acts (i) are thought to exceed the appropriate scope of business even if it relates to the performance of business. Also, the “mental abuse” acts (ii) or “cutting off from human relationships” (iii) are believed, in principle, to exceed the appropriate scope of business since they are usually unnecessary for business. On the other hand, with regard to categories (iv) through (vi), it may be difficult to draw the line between harassment and acts falling under appropriate guidance. What actions are beyond appropriate scope of business is affected by the type of business as well as by corporate culture, and the actual decision may depend on the situation where the acts are conducted or on whether the acts are continuous. Therefore, each company and workplace should obtain internal consensus and specify the scope.

4.2.2 Recommendations of the Round-table Conference

In response to the Report by the Working Group, the Round-table Conference released its Recommendations in March 2012. Based on the Report, the Recommendations provide a strong message by calling for actions of each individual from his/her standpoint, to prevent and resolve the issue and emphasize the significance of efforts towards resolution, because any worker may be involved in a harassment incident.

It is a matter of course that employers and trade unions should exert concerted efforts for prevention and resolution of harassment issues, and members of the workplace are requested to address the issue from their respective positions.

Top management should foster corporate culture so as to not generate any such problems, and expressly state that no power harassment should be tolerated at the workplace, while acting as a role model. Superiors should not commit any act of power harassment, and should not allow subordinates to commit any act of harassment. But they should not hesitate to give necessary guidance. Individual workers are expected to be aware of difference in sense of values of each other, accept each other, respect the personality of others, have appropriate communication for mutual understanding and cooperation, not to overlook problems, and support each other by calling out to each other without isolating the victim of power harassment. And the national government and organisations of employers and trade unions are expected to publicize this Recommendations etc and provide support for measures taken by a wide range of companies. The Recommendations then concludes that this is the first step towards eliminating power harassment from the workplace, and creating society where the dignity and personality of workers are respected.

5. Intervention and prevention on the part of employers and trade unions

5.1 Actual situation

Unfortunately, not many employers in Japan have taken measures against workplace bullying so far. Employers which answered that they have taken any measure for its intervention and prevention are only 45.4% (MHLW Survey). And the situation varies by number of employees. 76.3% of Employers with more than 1,000 employees tackle this issue; however, only 18.2% of employers with less than 100 employees take any measure.

On the other hand, to what extent do trade unions tackle this issue? Since we have had no statistical nationwide data on the actual situation of the measures by trade unions yet, we cannot grasp the situation accurately and in details. In an easy questionnaire conducted

by JILPT for about 30 unions (industrial unions and large enterprise unions) in May 2011, approximately two thirds of the unions do not tackle workplace bullying at all.

5.2 Characteristics of measures taken by employers and trade unions: helpline, questionnaire surveys, awareness raising, etc.

5.2.1 Measures suggested in the Report

Not many employers and trade unions take measures at this moment, but nevertheless some organisations have started proactive measures for this issue. The second part of the Working Group Report describes the measures to prevent and resolve workplace power harassment, which should be taken mainly by employers and trade unions (Table 5). The descriptions in this part are based on the interview survey conducted by JILPT, targeting 33 employers and trade unions engaged in carrying out proactive measures to cope with workplace bullying.²⁰

Table 5: Major measures taken by employers and trade unions, reported by the Working Group

For prevention of workplace power harassment
<ul style="list-style-type: none"> ○ Send a clear message from top management <ul style="list-style-type: none"> ▶ Top management should clearly show a policy to eliminate power harassment from their workplace. ○ Make rules <ul style="list-style-type: none"> ▶ Introduce harassment-related provisions in the work rules, conclude a collective agreement, develop measures and guidelines for prevention and resolution. ○ Identify the actual situation <ul style="list-style-type: none"> ▶ Conduct questionnaire surveys for employees. ○ Educate <ul style="list-style-type: none"> ▶ Provide training programs. ○ Raise awareness <ul style="list-style-type: none"> ▶ Announce and raise awareness of the organization's policy and measures.
For resolution of workplace power harassment
<ul style="list-style-type: none"> ○ Set up a place for consultation and resolution <ul style="list-style-type: none"> ▶ Set up an in-house or outside helpline desk; assign a person in charge at each workplace ○ Prevent recurrence <ul style="list-style-type: none"> ▶ Provide training for those who have committed harassment, so as to prevent them from committing it again.

5.2.2 Characteristics of major measures in the JILPT Survey

According to the JILPT interview survey, the top three measures taken by employers

²⁰ See the JILPT interview survey, *supra* note 12.

and trade unions to cope with harassment are: (1) set up and operate a helpline; understand the actual situation by questionnaire surveys; and (3) provide awareness raising, training, and education.

The first measure, to set up and operate a helpline, is the most popular measure carried out by employers. There are three ways of implementing this measure: having an in-house helpline, an outside one, or both. Most employers and trade unions set up their own helpline separately, while in some cases, employers and trade unions set up and operate it jointly.

The second measure, to understand the actual situation by questionnaire surveys, was carried out by about one-third of the employers and trade unions targeted in the JILPT survey. Some of them not only use the questionnaire survey to understand the actual situation of harassment, but also give feedback information of the survey results to the employees who participated in the survey.

As for the third measure, to provide awareness raising, etc., most of the surveyed companies carried out awareness-raising activities as well as training and educational programs with regard to harassment, such as clarifying the anti-harassment policy, announcing the availability of a helpline, and introducing example cases. Training was provided mostly by outside specialists or in-house staff specialized in this issue, whereas some employers assign the managerial personnel in the workplace to provide training for each office or for non-managerial personnel.

There are two measures that were not carried out by many companies, but seem to be important. One is to promote communication and create an open atmosphere in the workplace. As the lack of workplace communication was frequently mentioned as one of the factors causing harassment, some employers and trade unions took measures to enhance communication among personnel.

The other measure is to hold discussions and share information on harassment between labour and management. At companies which have trade unions, this measure seems to be conducive to prevention and resolution of harassment.

One of noticeable measures ascertained through the JILPT survey is the support provided by industrial unions to their member unions. Some industrial unions provide their member unions with model collective agreements on harassment, or support for the conclusion of such agreements, while others make a collective request for the introduction of anti-harassment regulations or establishment of a helpline. According to the JILPT Survey, many member unions working on measures against harassment received support from industrial unions. Probably, under the present situation where individual member unions have only limited knowledge of harassment or experience in coping with harassment, support from industrial unions serves as a great driving force for their member unions, so it is hoped that superior organisations like industrial unions will increase such support in the future.

5.2.3 Measures taken by trade unions

The Working Group Report states that as the first step, employers must advocate a clear policy that workplace power harassment must be eliminated, that is, the report states that employers must take the initiative in coping with this issue. However, as mentioned above, the JILPT survey has revealed that, focusing on companies that have trade unions, greater progress has been made in anti-harassment measures in the organisations. This suggests that it is vital for trade unions to engage in measures against workplace bullying

and power harassment, independently or jointly with employers. Brief descriptions of the measures actually taken by trade unions are provided below, based on the results of the JILPT survey.

(1) Gunze Trade Union

The union takes the following measures. (i) It conducts a biennial survey of union member satisfaction, which asks questions about power harassment and requests free form comments on this issue, in order to understand the actual situation of harassment. (ii) A harassment helpline is set up at the headquarters and each local office, and personnel from both labor and management are assigned to this helpline. A poster is put up at each workplace to indicate the person in charge of consultations in the helpline and the flow of the consultation process. Issues brought to the helpline by workers are forwarded to the company on the basis of necessity and the workers' consent, so that labor and management can share information and tackle the issues together. The company and the union hold a central helpline meeting twice a year and discuss measures against harassment, including harassment consultation services. (iii) Prevention of harassment is included in the training topics for union executives.

(2) YA Trade Union

The trade union of Company YA (retailer of perishable goods, etc.) takes the following measures. (i) In response to the request for awareness-raising activities from workers complaining harassment, the union prepared and put up a poster saying "STOP Power Harassment." (ii) In order to understand the actual situation of harassment, the union conducted a questionnaire survey on harassment, targeting not only union members but also all workers, including non-permanent employees. (iii) In the survey, many workers answered that they are ignored when they say greeting words to their superiors (24%). The union found the need to stimulate communication among employees, and launched campaigns to encourage employees to exchange greetings and say words of thanks to each other. (iv) The union operates two helplines to deal with harassment, one operated jointly with the employer and the other operated independently by the union.

(3) Nippon Care-service Craft Union, YB Branch

(i) The union branch concluded with the company (YB) a collective agreement on harassment, using a model agreement prepared by the industrial union with which it is affiliated, UA Zensen. (ii) At the union's request, the employer subsequently introduced "harassment regulations" as detailed rules for its work rule.

(4) YC Trade Union

The trade union of YC Group (wholesale/retailing business) takes the following measures. (i) The union conducts an annual questionnaire survey for union members, which asks questions on power harassment and requests free form comments on this issue. (ii) After a series of power harassment incidents occurred, a labor-management human rights committee was set up to discuss the issue of violation of human rights through power harassment. The committee analyzed the causes of the incidents, and considered how to resolve and prevent such incidents. (iii) The union reported the power harassment incidents and the developments in labor-management discussion on this issue as running stories on its newspaper, thereby raising awareness of union members.

(5) YD Trade Union

The trade union of YD Group (pharmaceutical-related business) takes the following measures. (i) As it saw an increase in the number of complaints about power harassment, the union considered it important to improve workers' communication skills so that they would not be harassed by others nor harass others, and introduced an awareness-raising program designed for building good human relationships in the workplace by understanding themselves and others. Specifically, it prepared comics-style serial booklets which depict actual harassment incidents that occurred in the company, and distributed them to all union members on a bimonthly basis. (ii) A labor-management grievance committee meeting was held twice or three times a month to share information on the complaints (including those on harassment) brought to the employer and the union, and to discuss how to resolve these complaints.

6. Roles and functions of voluntary organizations

Unfortunately, there are only a few private organizations in Japan that carry out activities to cope with workplace bullying. One such organization is the Association Against Workplace Moral Harassment (AAWMH), which is based in Osaka. People who suffered moral harassment at their workplaces founded this group, wishing to be of some help to other people who are experiencing the same kind of suffering as theirs. Actually, the founders first got together when they invited Dr. Marie-France Hirigoyen, a French psychiatrist and a leading expert in moral harassment study, to Japan for a lecture meeting in February 2006. Those who prepared for this event became a group; they did not break up after the event but continued activities together, such as holding gatherings to study and develop understanding of moral harassment, participating in international conferences, and discussing preventive measures while using examples from those implemented abroad. Finally, in May 2007, they made a fresh start as AAWMH. The group has made it a goal to provide information on workplace moral harassment to the public, support victims, and identify the actual situation of damage, through partnerships with other relevant organizations. Presently, the group provides telephone consultation services to hear complaints on workplace bullying, three days a month, two hours per day.

Another private organization is the Bullying/Mental Health Worker Support Center, which is based in Tokyo. This is an organization established in October 2010 by Mr. Shigeru Chiba, who had long been engaged in consultation services for complaints about workplace bullying and mental health issues in Tokyo Managers' Union. Presently, the center carries out the following activities: 1. hearing complaints from workers who have experienced workplace bullying or harassment or become mentally sick due to overwork, and providing advice and support for trade unions and other groups engaged in providing mental health care in the workplace; 2. helping workers who have experienced workplace bullying or harassment or become mentally sick due to overwork, in their process to return to their workplaces, claim industrial injury compensation, and file actions when necessary; 3. providing workers with learning and training programs on measures against workplace bullying and mental health care; 4. collecting and providing information on workplace bullying and mental health care; and 5. putting together information on the complaints on workplace bullying brought to each community union and the measures taken to resolve them, and drafting guidelines for prevention of workplace power harassment, and proposing policies toward the Government like MHLW.

In Japan, where workplace bullying has not yet been studied very actively among academics, private organizations seems to have played and are currently playing a certain role in this field, in making the actual situation public and responding to workers' complaints of workplace bullying.

7. Critique and conclusion

According to the situation on workplace bullying in Japan I referred above, I should point out some implications and critiques as conclusion. Firstly, significance to tackle workplace bullying and knowledge of consequences after bullying has not been shared in the society. Therefore not many employers and trade unions are implementing the intervention and prevention. Even if they take some measures, their effectiveness is much questioned. For example, very few workers (1.8% in companies' helpline; 1.4% outside consultation helpline) consult the matters with the helpline, and 46.7% did (maybe could) nothing at all after they were bullied (MHLW Survey). National policies for raising awareness seem to be urgent. And especially trade unions appear to be reluctant to tackle workplace bullying. Thus, the superior organisations like Rengo (national center) or industrial unions should also increase support toward member unions in the future.

Secondly, as for the present national policies on workplace bullying like Round-table Conference's Recommendations, there is no binding power and the effectiveness is very limited. It is essential for us to examine what kind of enforcement system against workplace bullying will be needed in the near future.

Finally, before considering the policies, one of the principal problems here is the lack of academic studies on bullying in the workplace. Only few research surveys or studies operated in Japan so far and it causes limited understanding of the actual situation in this country which should be base for considering the appropriate policies. And also background or causes behind bullying and measures of intervention and prevention by organisations have not researched enough yet. It is much hoped that more academic interest pour into the issue of workplace bullying and can offer the effective measures to eliminate it from the workplace.

Addressing Workplace Bullying and Harassment in Canada, Research, Legislation, and Stakeholder Overview: Profiling a Union Program

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Introduction

At first glance a picture of the understanding and efforts to address workplace bullying in Canada seems to emerge in a disconnected way. However upon closer exploration a good deal is happening across the country, although there remains a sense of separateness with respect to legislation and policies nationwide. With so much attention on research into the dynamics and health harming behaviours of workplace bullying globally, in order to understand the Canadian landscape with respect to this topic, we need to understand something of the geographical, historical, and demographic trends.

We begin by examining research into the topic of workplace bullying taking place across the country, however, we need to also consider our language and definitions for a common understanding of this current global phenomenon.

Legislation in federal and provincial jurisdictions will be highlighted as well as some of the initiatives the various stakeholders have taken on. This will include non-government organizations, the academic arena and labour/trade unions. One particular program, Working Toward Bully-Free Workplaces, developed by the Nova Scotia Government and General Employees Union (NSGEU) will be noted throughout the paper as it adds to the known research by offering a validated and evaluated program.

The paper will touch on initiative and legislation or pending legislation in two areas closely aligned with workplace bullying, domestic violence in the workplace, and mental health and workplace violence in the form of bullying. While strategies for dealing with workplace bullying need to address both culture and policy, we need to consider what strategies to utilize beyond tougher sanctions. One which is advocated by the NSGEU looks at restorative workplaces programming.

Finally, can Canada as a nation offer a coherent response to promote a cultural shift and provide congruent policy setting nationally, while respecting provincial, regional, and ethnic diversity? To manage effective change we need a clear vision for change, along with skills, incentives, resources, and an action plan. With any one of these factors missing or inarticulated we will experience confusion, anxiety, false starts, frustration, and change that is very gradual; all conditions which will perpetuate the problem.

1. The national picture

Canada is a vast country with immense sparsely populated areas. It is the second largest country in the world by land mass with a population of approximately 34.5 million people. With a global population of seven billion, Canada has only .5% of the world's population!

Geographical regions also have particular cultural identities. The west: British Columbia; the prairies: Alberta, Saskatchewan, and Manitoba; the east: Ontario and Quebec; the Atlantic region: New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland & Labrador; and the north: a vast area encompassing the three territories of Nunavut, Northwest Territories, and Yukon.

For 58.8% of the population English is cited as the official language while French, mostly in Quebec, is the official language for 21.6%. According to 2006 census data other languages accounted for 19.6%. Ethnic groups are comprised as follows; British Isles origin 28%; French origin 23%; other European 15%; Amerindian 2%; other, mostly Asian, African, and Arab 6%; mixed background 26%. Demographically it is estimated that by the year 2031, 28% of Canadians will be foreign born. The map (Figure 1) presents a picture of the leading ethnicity according to census data nationwide. Understanding the geography, ethnicity, and history as well as demographic trends are necessary to appreciate the scale of research of the topic being undertaken, as well as possible remedies.

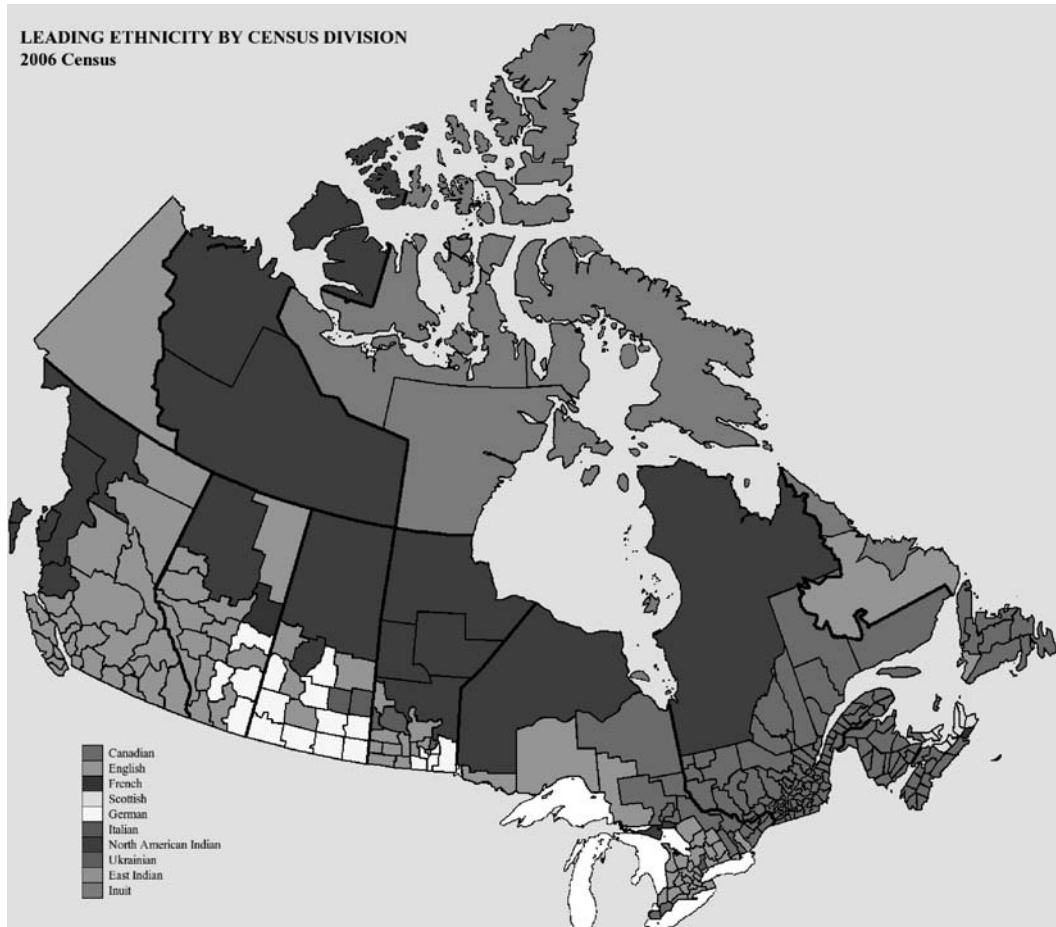
On the world stage the perception of Canadians is one of relaxed and tolerant multiculturalism. Canadian people are perceived to be friendly, polite, fair, respectful, and quick with an apology. Canada is a young country celebrating less than 150 years as a nation, with the first European English, Scottish, Irish, and French explorers and settlers arriving in the mid 1600s. Those who identify themselves as Canadian according to ethnicity are largely the descendants of those early pioneers.

Ironically our early history is one of struggle and conflict. The people who came here often sought to escape harsh economic and political conditions and found themselves dealing with extreme physical conditions. However those who came to escape oppression also became the oppressors. Today Canada's indigenous, or First Nations, population comprise only about 4% of the total population, which also includes Metis (French, Scottish, Irish, and First Nations) and Inuit in the north.

Only recently has there been an apology and attempts at reparation for what many are reluctant to name as the genocide¹ inflicted on the First Nations of this country. This was wrought through residential school programs which operated from 1876 to 1996 and saw native children uprooted from family, culture, and language. A public apology was offered June 11, 2008 not only by Prime Minister Stephen Harper on behalf of the Government of Canada, but also by the leaders of all the other parties in the Canadian House of Commons.

¹Residential Schools: Canada's program a form of genocide says Truth and Reconciliation Chair, 2/18/2012, http://www.huffingtonpost.ca/2012/02/17/residential-schools-canada-genocide_n_1285371.html (accessed November 28, 2012).

Figure 1: Leading Ethnicity According to Census Data²



Another example in 1988³ saw former Prime Minister Brian Mulroney formally apologize to Japanese Canadians who experienced detention during World War II. Three quarters of those interred from the British Columbia coast were born or naturalized Canadian citizens. Today in Nova Scotia news articles are describing abuse and neglect at the Nova Scotia Home for Coloured Children with calls for a public inquiry.⁴

This preface to a discussion of workplace bullying in Canada provides a context to understand predisposing and precipitating influences as well as perpetuating factors. Malcolm Gladwell⁵ draws on the term *social inheritance* to describe how behavioural and emotional patterns are passed on, emphasizing the role of cultural legacies.

² Ethnic origins of people on Canada, http://en.wikipedia.org/wiki/Ethnic_origins_of_people_in_Canada (accessed November 28,2012).

³ the Internment Camp s of Japanese Canadians in Canada during world War II, November 2007, <http://timeinmoments.wordpress.com/2007/11/06/the-internment-camps-of-japanese-canadians-in-canada-during-world-war-ii/> (accessed November 29, 2012).

⁴ Read it on Global News: Former N.S. Home for Colored Children directors not opposed to abuse inquiry, <http://thechronicleherald.ca/novascotia/149056-timeline>

⁵ Malcolm Gladwell presents an explanation of how the habits of highly successful people pale in importance to where, when and how you were raised. He elaborates on the part played by opportunity and legacy, and what he terms social

1.a. Research in Canada

The Canadian Safety Council has reported that 75% of victims of bullying leave their jobs and that workplace bullying is four times more common than sexual harassment or workplace discrimination. This implies significant monetary and human costs. “Given the growing evidence that bullying represents by far the most prevalent form of violence and harassment, an emphasis in financial terms on bullying is, therefore, justifiable.”⁶

Economic or monetary costs are incurred directly through loss of wages and added expenditures, primarily of health care and medical treatment. Along with loss of wages due to sickness and absence, there is premature retirement and replacement costs in connection with high turnover (recruitment and training). Grievance and litigation and associated compensation costs, damage to equipment and production or productivity resulting from errors and accidents are also costly; with reduced performance and productivity (lack of added value to product and service) as well as loss of public goodwill and reputation.

Human costs refers to the pain, fear and general reduction in quality of life for both the targetted individual as well as potential grief experienced by family and closest friends. Jacqueline Power, an assistant professor of management at the University of Windsor's Odette School of Business, has spent years researching bullies in the workplace. She says 40 per cent of Canadians have experienced one or more acts of workplace bullying at least once a week for the last six months.⁷

Across the country academics in various educational institutions, ad hoc groups, business interests, unions and governments are struggling to understand, define and address issues associated with bullying, both in schools and in the workplace. The research includes ideas and philosophies on remediation and elimination of various forms of workplace mistreatment. Dr. Michael Leiter, of Acadia University in Nova Scotia has been engaged in a long term study of workplace civility. He considers workplace mistreatment to include behaviours of incivility, abuse, bullying, violence and social undermining. While these behaviours may have a common underlying mechanism, dimishment of another person or persons, all result in harm. This paper focuses on bullying in the workplace.

1.b. Language and definitions for a common understanding

A critical starting point in examining workplace bullying is a clear definition. It is often termed psychological or personal harassment to distinguish it from harassment which occurs under the protected grounds of the Canadian Human Rights Act; where European language generally refers to moral harassment. The Canada Safety Council⁸ defines bullying as an abuse of power, a violation of an employee's rights and a betrayal of the trust that should exist between an employer and employee. Bullying is a trespass of an individual's freedoms, a denial of the right to earn a living and, eventually, the destruction of an individual.

inheritance. Malcolm Gladwell, *Outliers, the Story of Success*, Back Bay Books, Little, Brown and company, New York, 2008.

⁶ Helge Hoel, Kate Sparks & Cary L. Cooper. *The Cost of violence/Stress at Work and the Benefits of a Violence/Stress-Free Working Environment Report* Commissioned by the International labour organization (ILO) Geneva. January 1, 2001, http://www.ilo.org/safework/info/publications/WCMS_118190/lang--en/index.htm

⁷ <http://www.cbc.ca/news/canada/windsor/story/2011/12/06/wdr-cbsa-bullying-johnston.html>

⁸ Canada Safety Council <https://canadasafetycouncil.org> (Accessed November 24, 2012).

The terms bullying and harassment are often used interchangeably, so what constitutes psychological harassment at work? Attempt at clarification is outlined in Table 1.

Table 1: Differences between harassment and workplace bullying⁹

Harassment	Workplace bullying
Often physical, e.g. contact and touch in various forms, intrusion into personal space and damage to possessions	Almost exclusively psychological may become physical over time
Tends to focus on the individual because of what they are focus on (e.g. gender, race, disabled, etc.)	Individuals are targeted particularly if they are competent, skilled or popular
Harassment is based on discrimination of protected grounds under human rights, e.g., gender, race	Although bullies are deeply prejudiced, behaviour is on the basis of personal attributes, such as competence (envy) and popularity (jealousy)
May consist of a single incident	Rarely a single incident but a pattern of behaviour increasing in intensity and duration.
The person being harassed knows almost straight away they are being harassed	The person being bullied initially may not realise they are being bullied
Harassment often reveals itself through use of recognised offensive and stereotypical vocabulary	Tends to fixate on trivial criticisms and false allegations of underperformance
Often an element of possession such as in stalking	The impetus is control and subjugation
Harassment may be for peer approval, bravado, macho image, i.e. more visible to others	Not only the target but witnesses may not recognize the bullying behaviour
May occur in and out of work	The bullying originates in the context of the workplace
Perceives an easy target	The target is seen as someone who must be controlled

A consensus definition used by the NSGEU defines bullying as health harming behaviour, which is repeated and persistent. It is a pattern of behaviour that targets an individual in order to undermine, offend, or humiliate such that it results in feelings of personal diminishment that over time can result in physical, emotional and behavioural symptoms.¹⁰ There is also a power imbalance even if the target and person who bullies are of the same rank. The target feels powerless to successfully protect or defend him/herself against the willful or negligent infliction of emotional distress. In this definition it does not

⁹ adapted from Bully On Line, <http://www.bullyonline.org/workbully/bully.htm#Difference%20between%20bullying%20and%20harassment> (accessed November 30, 2012).

¹⁰ a more complete definition of terms can be found on the NSGEU website: nsgeu.org.

matter if someone intended to do harm, rather the focus is on the harm that is done and what will correct or remedy the situation.

The NSGEU and several jurisdictions consider that “Workplace bullying encompasses both intentional and unwitting behaviours (words, gestures, images, actions, and failure to act) which, over time, humiliate, demoralize, or terrorize an employee or group of employees, undermine their targets’ credibility and effectiveness, and contribute to a disrespectful or hostile work environment.”¹¹ In other words it removes the onus on proving an intent to do harm, but instead considers the harm that occurs. However, we can see the challenges which arise in a country of great regional, historical, and economic diversity to arrive at a national policy.

2. Legislation in Canada

To what extent are existing protections against grounds-based harassment in human rights legislation contained within the new psychological harassment labour standard?¹² Must there be a malicious intent on the part of the perpetrator(s) of psychological harassment? How does psychological harassment differ from employee discipline or certain management techniques? What degree or type of harm must be caused by the psychological harassment? What are an employer’s obligations in the face of a situation of psychological harassment? These are some of the questions which arise in the course of determining legislation.

The impetus for legislation in Canada and the need for workplace policies was underscored when on April 6, 1999; a former employee of OC Transpo in Ottawa shot four employees dead, and then took his own life. This employee had been the target of workplace bullying. Among the recommendations of a coroner’s inquest was that the definition of workplace violence should include not only physical violence but also psychological violence such as bullying, mobbing, teasing, ridicule or any other act or words that could psychologically hurt or isolate a person in the workplace.

At that time no jurisdiction in Canada required employers to have a workplace violence prevention program. For that reason, the OC Transpo jury recommended that federal and provincial governments enact legislation to prevent workplace violence and that employers develop policies to address violence and harassment.

Real impetus for change across the country came in 2004 when Quebec legislation recognized the importance of protecting employees from *any* form of violence, whether verbal, psychological or physical in the workplace.

2.a. Canadian Charter of Human Rights and Freedoms

Enacted in 1982, The *Canadian Charter of Rights and Freedoms*¹³ guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Signed April 17, 1982, The Charter of Rights and Freedoms not only prohibits discrimination based on race or gender, it protects mobility and language rights and enshrines the presumption of innocence.

¹¹ *Research Team on Workplace Violence and Abuse, Muriel McQueen Fergusson Centre for Family Violence, University of New Brunswick, <http://www.unbf.ca>*

¹² http://www.hrsdc.gc.ca/eng/labour/employment_standards/fls/research/research14/page06.shtml

¹³ Department of Justice, (Website Dec. 1, 2012) http://laws-lois.justice.gc.ca/eng/Const/Const_index.html

Balancing the rights of legislatures and courts which give the federal and provincial parliaments limited powers to override court decisions, the charter requires governments to justify all legislation in light of human rights.

Protection provided by all federal and provincial legislation is limited because the Canadian Bill of Rights, the Canadian Human Rights Act, and all provincial human rights codes are only legislation; which made it possible to repeal them. It was not until the advent of the *Canadian Charter of Rights and Freedoms* that human rights in Canada were protected in the Constitution. The Charter has been influencing Canadian law, jurisprudence, and the drafting of constitutions around the world, and is considered the constitutional document most emulated by other nations.

2.b. Canadian and Provincial Human Rights Acts

In Canada, federal, provincial, or territorial governments protect the individual's rights and freedoms. The territorial governments may also legislate to protect human rights, since the federal government has delegated those powers to them. Federal and provincial laws protect people from harassment related to work, and include the Canadian Human Rights Act, Provincial Human Rights laws, and the Canada Labour Code.

The Canadian Bill of Rights (1960) was the first federal law that specifically set out fundamental human rights for Canadians until 1977 when Parliament passed the *Canadian Human Rights Act*.¹⁴ The purpose of the Act is to ensure equality of opportunity and freedom from discrimination particularly in the areas of employment, housing and commercial premises; and applies not only to the federal government but also to the private sector in matters that are regulated directly by the federal government. The Canadian Human Rights Act and many provincial laws apply to harassment based on prohibited grounds which include; race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability, pardoned conviction, or sexual orientation.

However, an estimated one in ten workers have experienced some form of workplace bullying, and specific federal and provincial labour laws have been slow to respond. "When faced with harassment that does not fit into the human rights definition, employees are often left with only their own organization's harassment policies for defence."¹⁵ There is, however, a long tradition in Canada of labour legislation and policy designed for the promotion of the common well-being through the encouragement of free collective bargaining and the constructive settlement of disputes.

Employers are required by the *Canada Labour Code*¹⁶ to develop their own policies and guidelines on harassment. These policies should include definitions of harassment and procedures for dealing with complaints. Policies should also protect employees from harassment by nonemployees e.g., clients, customers, outside contractors and other members of the public.

2.c. Occupational Safety Acts

Canada's *Occupational Health and Safety Act*¹⁷ now called the *Workplace Occupational Health and Safety Act* is intended to make clear the employer responsibility

¹⁴ Canadian Human Rights Commission (Website Dec., 2012) http://www.chrc-ccdp.ca/about/human_rights_act-eng.aspx

¹⁵ Article by Jennifer McCarthy, *Family Service Canada Consultant. Website Dec. 2012*
http://www.familyservicescap.com/_files/solutions_newsletters/solutions35.pdf

¹⁶ Canada Labour Code (Website Dec 2012) <http://laws-lois.justice.gc.ca/eng/acts/L-2/>

¹⁷ <http://www.labour.gov.on.ca/english/hs/laws/index.php>

to provide a safe and healthy workplace. While it specifically lays out the conditions for physical safety requirements in workplaces and what is outlines what is necessary to protect the physical health of workers; the issue of psychological safety is often an implied one.

According to recent reports prepared by Dr. Martin Shain (University of Toronto) for the Mental Health Commission of Canada (MHCC)¹⁸ and referred to as the Shain Reports, Psychological Safety and the Law in the Canadian Workplace, a dramatic legal evolution is transforming Canadian workplaces. For the first time in Canadian history, employers are confronted with a legal duty to maintain not only a physically safe workplace, but also a *psychologically safe* work environment. A psychologically safe workplace as considered one in which every practical effort is made to avoid reasonably foreseeable injury to the mental health of employees.

2.d. Provincial legislation on workplace harassment/bullying

Across the country there is a need to align federal and provincial legislation while respecting the distinctions of the various provinces and territories. To date five provinces in Canada have specific legislation requiring employers to seek to provide workplaces free of harassment. See Appendix B. Provincial legislation according to province: No longer limited to human rights-related harassment, the term is broadly defined in these laws. Key points of provincial legislation are outlined.

Quebec

Particular attention is paid to Quebec, the first North American jurisdiction to introduce provision into its labour standards law in June 2004. The Quebec Labour Standards Act states: “Every employee has a right to a work environment free from psychological harassment. Employers must take reasonable action to prevent psychological harassment and, whenever they become aware of such behaviour, to put a stop to it.”¹⁹

Quebec legislation defines psychological harassment at work as:

“...any vexatious (meaning troublesome or annoying) behaviour in the form of repeated and hostile or unwanted conduct, verbal comments, actions or gestures, that affects an employee’s dignity or psychological or physical integrity and that results in a harmful work environment for the employee. A single serious incidence of such behaviour that has a lasting harmful effect on an employee may also constitute psychological harassment.”²⁰

The Quebec government is precise in describing the scope and meaning of its new provisions on psychological harassment; it defines *vexatious behaviour* as humiliating or abusive behaviour that lowers a person’s self-esteem or causes him/her torment. The behaviour also exceeds what the person considers to be appropriate and reasonable in the performance of his/her work. Most analysts maintain that the existence of psychological harassment is determined by the effects on the target who experiences the harassment rather than on the intent of the perpetrator.

¹⁸ The Shain reports, *Stress at Work, Mental Injury and the Law in Canada (2009)* .

¹⁹ Archived - Rights, Respect and Dignity: Interface of Labour Standards and Human Rights Legislation (Website November 16, 2012) www.labour.gc.ca
http://www.hrsdc.gc.ca/eng/labour/employment_standards/fls/research/research14/page10.shtml#ftn78

²⁰ Ibid.

While the employer cannot guarantee that there will never be any psychological harassment they must prevent any psychological harassment situation through reasonable means; and act to put a stop to any psychological harassment as soon as they are informed of it, by applying appropriate measures, including necessary sanctions.

The Quebec legislation through the Labour Standards Commission enumerates a number of examples of how harassment is expressed and the statutory definition also affirms harassment that undermines either the psychological or physical integrity of an employee. The Commission notes that psychological harassment must not be confused with the normal exercise of the employer's management rights, in particular his right to assign tasks and his right to reprimand or impose disciplinary sanctions.

Various options exist for different groups of employees. Unionized employees may file a grievance since the legislation reads protection against psychological harassment into all collective agreements regulated pursuant to Quebec labour law. Non-unionized employees may file complaints with the Labour Standards Commission, which is then required to investigate the complaint. If no settlement is reached between the parties, the complaint may be referred to the "Commission des relations du travail" (similar to a labour board) for adjudication. Public service employees not governed by a collective agreement file complaints with the Public Services Commission.

Given the definition of psychological harassment in the Quebec legislation, all problems of grounds-based harassment, currently protected in human rights legislation, would also constitute problems of psychological harassment. Where psychological harassment constitutes grounds-based harassment employees have a choice of pursuing a human rights complaint or complaining through the labour standards process. Quebec legislation on psychological harassment was designed to emphasize on the importance of prevention. That explains why the obligations set forth in the Labour Standards Commission fall on the employer's shoulders instead of on the harasser himself, with the ultimate objective being to provide a work environment free of psychological harassment.

It is worth noting that in June 2005, one year following the new law coming into effect, the Labour Standards Commission reported receiving 2500 complaints of psychological harassment, and that less than 1 per cent of these complaints were considered frivolous.

Saskatchewan

The government of Saskatchewan proclaimed legislation expanding the definition of harassment under *The Occupational Health and Safety Act, 1993* effective October 1, 2007. Stating that Saskatchewan people have a right to healthy and safe work environments free from harassment, under the Act, employers are required to take reasonable steps to prevent and stop harassment that arises out of, or is connected to, a worker's employment. The new definition of harassment includes language to address personal harassment in the workplace, such as abuse of power and bullying. The legislation also allows for the appointment of an independent adjudicator to hear appeals arising from harassment complaints.

The legislation states that "Every employer shall ensure, insofar as is reasonably practicable, that the employer's workers are not exposed to harassment with respect to any matter or circumstance arising out of the workers' employment."²¹ The employer's duty

²¹ Opcit.

extends to harassment that involves a matter or circumstance arising out of the worker's employment and includes incidents occurring in the workplace as well as incidents outside the workplace if the event or circumstances arise out of the worker's employment.

WorkingWell is an employers' guide for dealing with harassment as defined in The Occupational Health and Safety Act, 1993 & Regulations. As in Quebec, Saskatchewan has termed bullying *harassment*. The legislation defines harassment as; "any inappropriate conduct, comment, display, action, or gesture by a person: that either adversely affects the worker's psychological or physical well-being and that the person knows or ought reasonably to know would cause a worker to be humiliated or intimidated..."²²

To constitute harassment there must be; (a) repeated conduct, comments, displays, actions or gestures must be established; or (b) a single, serious occurrence of conduct, or a single, serious comment, display, action or gesture, that has a lasting, harmful effect on the worker must be established. As in the Quebec legislation harassment can exist even where there is no intention to harass or offend; and harassment does not include anything that falls within legitimate management rights which are outlined in the act. Although it explicitly states that managerial actions must be carried out in a manner that is reasonable and not abusive.

Saskatchewan legislation also clarifies situations that do not constitute harassment such as: physical contact necessary for the performance of the work using accepted industry standards, conduct which all parties agree is inoffensive or welcome and conflict or disagreements in the workplace that are not based on one of the prohibited grounds

Implementation began with the creation of a new harassment prevention unit within the Occupational Health and Safety Division of Saskatchewan Labour. The new unit was to focus on enforcing the anti-harassment legislation and educating workplaces on the new definition and complaint process. When an investigation determines that harassment has taken place, the employer must take corrective action to meet the requirements of section 36(1) of the OHS Regulations. In deciding what they will be done to stop, prevent and deter harassment, options may include action against persons in the workplace and third parties, including customers, clients and contractors. An employer's action will be defensible if it is based on a fair and competent investigation.

In terms of intervention the employer must ensure that the action is effective in stopping harassment and preventing its recurrence; is effective in protecting the complainant or others from reprisal; protects the privacy of the complainant and the harasser as much as possible; does not go against the collective agreement or any worker's employment contract; and that any discipline imposed on a worker is appropriate. Employers should not fail to take the action necessary to stop the harassment because they fear the trouble and expense that may result from defending the decision.

Ontario

On April 20, 2009, the Ontario government introduced Bill 168 in the legislature. The legislation amended the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 (the *OHSA*)²³ with respect to violence and harassment in the workplace. That act came into effect on June 15, 2010, and Ontario's legislation broadly defines workplace violence, as *including the actual, attempted, or threatened use of physical force that could injure a*

²² <http://www.lrws.gov.sk.ca/working-well-guide>

²³ http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=2181

worker. Workplace harassment defined in Bill 168 is similarly worded with Quebec and Saskatchewan and relies on the wording of reasonable behavioural that is known or ought reasonably to be known to be unwelcome.

The act states that an employer shall, prepare a policy with respect to workplace harassment; and review the policies as often as is necessary, but at least annually; and the policies shall be in written form and shall be posted at a conspicuous place in the workplace. An employer shall develop and maintain a program to implement the policy with respect to workplace harassment; an employer shall provide a worker with information and instruction that is appropriate for the worker with respect to workplace harassment; include measures and procedures for workers to report incidents of workplace harassment to the employer or supervisor; and set out how the employer will investigate and deal with incidents and complaints of workplace harassment; The remedies available are those available under Occupational Health and Safety Regulations. Ontario's new law extends beyond harassment and like the federal law, also will require antiviolenace policies and programs.

What is unique about Ontario's legislation is that the policies and program must also include measures to deal with *domestic violence* that may erupt in the workplace. Bill 168 says that "if an employer ought reasonably to be aware, that domestic violence may occur in the workplace, the employer shall take every precaution reasonable in the circumstances for the protection of the worker."

Ontario's law also contains new disclosure requirements where there is a risk of violence from a person with a history of violent behavior. This obligation will exist if the worker can be expected to encounter such a person in the course of his or her work and may therefore be exposed to the risk of physical injury. The law does not contain guidance on how such persons are to be identified but says that an employer should not disclose more confidential information than is reasonably necessary to protect the worker from physical injury. Ontario employers' existing policies will need to be reviewed and refined to meet the requirements of this new law.

Manitoba

Manitoba has made changes to its Workplace Health and Safety Act²⁴ effective February 1, 2011. Those changes include protection from workplace bullying, termed 'harassment.' It should be noted that the Regulation only provides protection for employees in the conduct of their work in the workplace, stating that objectionable conduct or comment has to be directed at a worker in the workplace.

The legislation amends the definition of harassment as objectionable conduct that creates a risk to the health of a worker; or severe conduct that adversely affects a worker's psychological or physical well-being. Conduct is objectionable, if it is based on race, creed, religion, colour, sex, sexual orientation, gender-determined characteristics, marital status, family status, source of income, political belief, political association, political activity, disability, physical size or weight, age, nationality, ancestry, or place of origin. It is severe if it could reasonably cause a worker to be humiliated or intimidated and is repeated, or in the case of a single occurrence, has a lasting, harmful effect on a worker.

In the definition harassment conduct includes a written or verbal comment, a physical act or gesture or display, or any combination of them. The definition overlaps with the

²⁴ http://www.gov.mb.ca/ctt/invest/busfacts/workforce/s_h_act.html

definition of discrimination, based on personal characteristics, under human rights legislation. As well, the legislation also speaks to the issue of management rights. Reasonable conduct of an employer or supervisor in respect of the management and direction of workers or the workplace is not harassment. The regulation requires all employers in Manitoba to develop and implement a written harassment prevention policy; and ensure that employees comply with the policy.

The harassment prevention policy must be developed in consultation with a workplace's safety and health committee or the safety and health representative or the employees. Whichever applies, include a specific definition of harassment that is spelled out in the regulation; and include content statements and basic procedures for making a complaint. The policy must be posted in a prominent location.

British Columbia

The British Columbia Resource Professional Association stated in May 2008, "workplace harassment and conflict is on the rise, causing increasing dissatisfaction among employees and reduced productivity in the workplace."²⁵

British Columbia is the most recent and fifth province to pass legislation on workplace bullying. Amendments to the province's *Workers' Compensation Act* came into effect on July 1, 2012. The new legislation amends the act's definitions of harassment and injury, and enables workers suffering from a mental disorder resulting from *significant work-related stressors* to seek compensation through WorkSafe BC. Previously, WorkSafe BC claims were limited to workplace accidents or severe emotional stress resulting from a traumatic event or series of stressors arising out of and in the course of the worker's employment. Now, the legislation specifically names bullying and harassment as a work-related stressor.

The legislation also introduces a requirement for employers with more than 10 employees to establish and implement a workplace harassment policy that includes measures for workers to report incidents of harassment and procedures for investigating such incidents. This also means employers could now be on the financial hook for emotionally harmful work environments. To qualify for compensation, the employee must suffer from a mental disorder that has been diagnosed by a psychiatrist or psychologist.

3. Stakeholders

Given the diversity of the Canadian landscape a large number of researchers and organizations have sprung up, often working independently to understand and address workplace bullying.

3.a. Non-government organizations, ad-hoc groups

Research on bullying shows the need to protect children and youth who experience forms of physical or mental violence, injury or abuse at the hands of their peers. While this paper does not address issues around school related bullying, Appendix B. provides an overview of several recognized areas of research and support for children and youth in Canada. Provincially and regionally other *ad hoc* and special interest groups may also be working to address the problems associated with bullying.

²⁵ Psychological Harassment and Bullying in the Workplace, April 22, 2008, Pam Bowman.

3.b. Academic

A significant amount of bullying research in Canada is focused on children and youth, e.g., PrevNet. However, a literature review for this paper with respect to workplace bullying showed conflicting information around statistics. For example, who bullies more males or females; who are the bullies supervisors or peers; and what are the financial workplace costs associated with bullying, are all worthwhile areas of inquiry. This inconsistent data is due in part to extrapolating American and European, particularly the United Kingdom, research data and making inferences about bullying in Canada. Another explanation as indicated earlier, is the significant diversity within the provinces, territories and regions in Canada.

A further challenge in academic research emerges due to lack of baseline and control data in order to do comparison studies. However, a number of individuals affiliated with several Canadian Universities are researching areas related to workplace bullying. Many of these individuals are also members of the International Association for Workplace Bullying and Harassment (IAWBH). Following the world conference on workplace bullying in Copenhagen, June 2012 there was an expressed interest in creating a network of Canadians researching and working in the area of workplace bullying.²⁶ At this date this remains a loose *ad hoc* group.

3.c. Labour/trade unions

With approximately 30%, or 4 million Canadian workers belonging to a union an interest from within Canada's unions on issues around workplace bullying has been recognized; however, these largely deal with ensuring workers know their rights with respect to legislation and collective agreements. Historically the role of the union is to advocate, arbitrate and assist members through the grievance process.

One study carried out by the U.S. based Workplace Bullying Institute on unions' role in workplace bullying, January 2011, showed about three-quarters of targets still believe that unions have a positive role to play. However the most important finding from this small sample survey is that 24% do not trust their unions any more than their employers.²⁷ The study presents an explanation for these results;

- Union officers often rise in the ranks based on their ability to fight and be adversarial in order to win victories for the unions' members.
- Unions are also organizations where the bureaucratic mindset can take over.
- Unions have been co-opted by partnership talk with employers which may be viewed as becoming submissive, e.g., employers threaten to move a business offshore if concessions are not made.
- When bullying is member-on-member, a union may become paralyzed and feel compelled to defend both the abusive and abused member. In reality, the responsibility is to represent, never to defend.

The article concludes by saying if unions are to regain the trust of their members, the above issues must be challenged honestly and reversed.

²⁶ It is worth noting that only two unions were represented at this international conference in Copenhagen, one from the UK and the NSGEU from Nova Scotia.

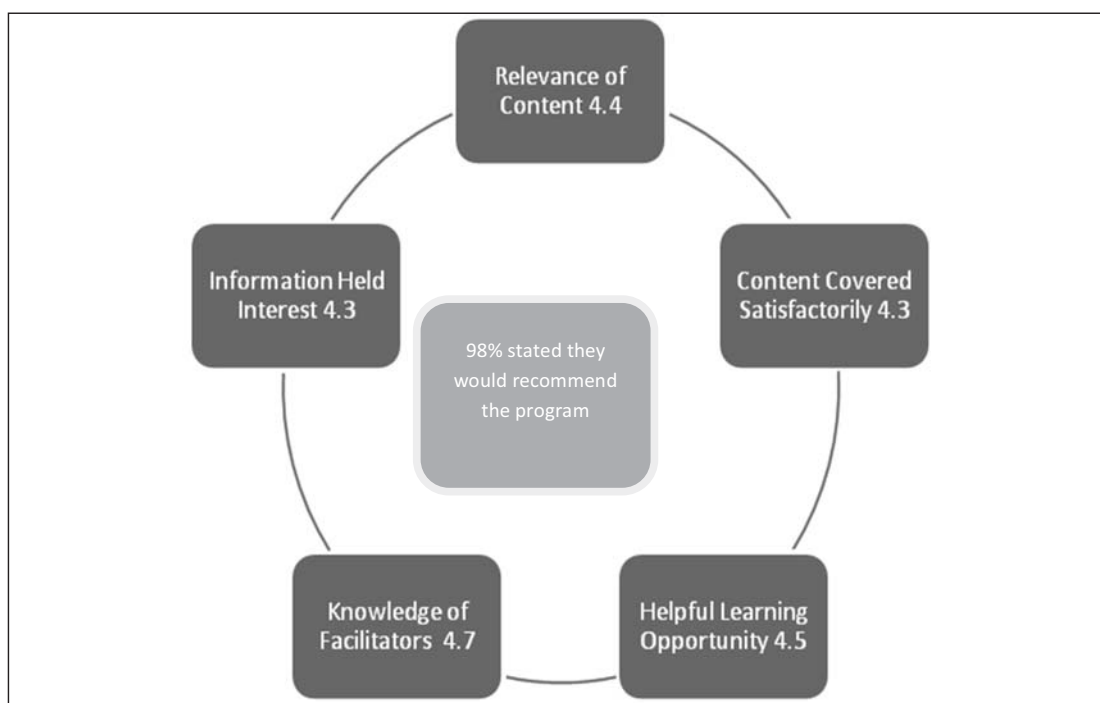
²⁷ <http://www.workplacebullying.org/2011/01/30/union-instant-poll/>

The Nova Scotia Government and General Employees Union (NSGEU) believes in the responsibility of the union to address the problem of workplace bullying as a form of violence. This is underscored by Nova Scotia's Occupational Health and Safety Act which states, "Every employer has a duty to provide a safe and healthy workplace" is an anchor to the program.

NSGEU's interest in the phenomenon of bullying and defining bullying as a form of workplace violence emerged from stories by workers about how they were being treated on the job. At the same time the definition and legislation dealing with psychological harassment in the workplace, and the release of respectful workplace policies was gaining momentum. The NSGEU made a significant commitment to its membership to address workplace bullying and publicly launched its Working Toward Bully-Free Workplaces initiative in September 2010.

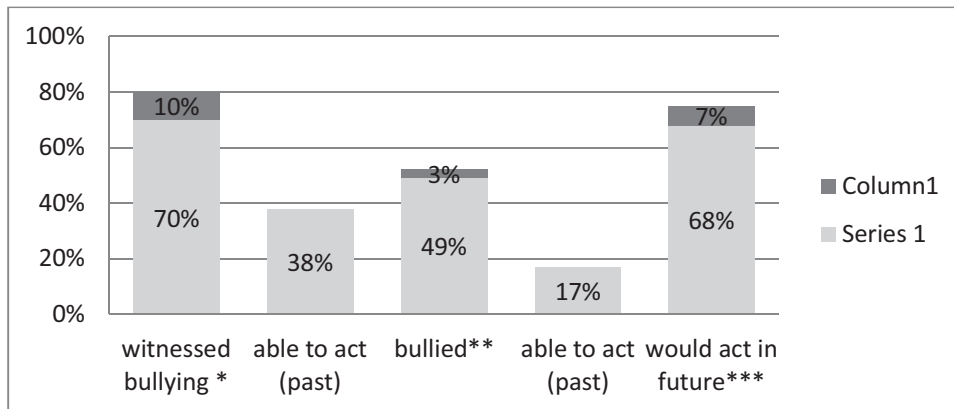
A unique feature of this program is the evaluation and employer feedback as shown in Figure 2 on program satisfaction for 2010-2011. The Program as developed was intended primarily as delivery of information; however we quickly realized that some participants were experiencing, perhaps for the first time, validation of their experiences.

Figure 2: Program Satisfaction, 2010



With both quantitative and qualitative data gathered some key concepts emerged: a) the pervasiveness of the problem throughout the employment sector, b) the significant impact on individuals and workplaces, and c) the need for appropriate interventions and movement of the program in the direction of restorative practices; which will be discussed further.

Figure 3: Quantitative Data – change as a result of attending program



*70-80 % of respondents indicated witnessing bullying.

** 49-52 % indicated being bullied, however many people choose not to answer this question, leading us to speculate this number is actually higher.

*** 68% responded they would now take action as a result of attending this program; an additional 7% state that they might take action, depending on what was at stake.

The mandate of the NSGEU remains that the program will be delivered to any employer in the province who requests it, and this commitment includes all employees in the workplace. Delivery has included other unions e.g., Canadian Union of Postal Employees (CUPE), Nova Scotia Nurses Union (NSNU), Nova Scotia Teachers Union (NSTU), Licensed Practical Nurses of Nova Scotia (LPNNS), New Brunswick Union of Public and Professional Employees (NBUPPE), and the National Association of Public Employees (NAPE), as well as non-unionized employees and their employers.

4. Direction and initiatives

Bullying is often called psychological harassment or violence due to the impact on a person's mental health and sense of well-being. The personalized, focused nature of the assault destabilizes and disassembles the target's identity, ego, strength, and ability to rebound from the assaults.²⁸ The longer the exposure to stressors like bullying, the more severe the psychological impact and unabated stress compromises both a target's physical and mental health. Distinguishing between psychological safety and psychological harm is shown in Table 2.

²⁸ <http://www.workplacebullying.org/individuals/impact/mental-health-harm/>

Table 2: Distinguishing between psychological safety and psychological harm

Psychological Safety	Psychological Harm
<ul style="list-style-type: none"> • Confidence to take risks at work <ul style="list-style-type: none"> – Be supported in efforts by supervisor and coworkers; – show appreciation for efforts – tolerate some setbacks when things become challenging. • Employees feel free to express opinions; <ul style="list-style-type: none"> – confident they can contribute and not be criticized for speaking candidly <p>http://www.workengagement.co</p>	<ul style="list-style-type: none"> • Being humiliated, intimidated, shouted at, threatened, bullied or constantly criticized. • It can also mean being controlled by someone, ignored or left alone. <p>http://www.actagainstharm.org/our-stories/psychological-harm/index.html</p>

In Canada concern on dealing with workplace bullying is not happening in isolation and is not disconnected from interconnected initiatives such as domestic violence in the workplace and the Canadian Mental Health Association. Additionally organizations such as the NSGEU recognizes that stricter policies and tougher sanctions may prove a deterrent in some situations but it can also contribute to more passive or subtle forms of bullying that will still leave targets physically and emotionally injured.

4.a. Domestic violence in the workplace

Bullying does not remain confined to the workplace and may transfer both into the home and from the home into the workplace. Interventions against domestic violence at work need to be considered and made consistent and explicit with existing Occupational Health and Safety Legislation. a report to the International Labour Congress suggests that “the workplace is no safe haven from violence with a considerable number of people exposed to physical assault.... However, across industrial sectors a large fraction of workers are exposed to psychological violence or bullying, In addition spillover from domestic abuse is increasingly seen as a workplace problem.”²⁹

4.b. Canadian Mental Health Association and workplace bullying-National Standard of Canada on Psychological Health and Safety in the Workplace

Over the last 20 years there have been significant developments in both law and a number of scientific disciplines with regard to defining the need for, and characteristics of, what has been termed the psychologically safe workplace. A psychologically safe

²⁹ Helge Hoel, Kate Sparks & Cary L. Cooper. The Cost of violence/Stress at Work and the Benefits of a Violence/Stress-Free Working Environment Report Commissioned by the International labour organization (ILO) Geneva. January 1, 2001 (54).

workplace, for these purposes, is defined as one that is the result of every reasonable effort being made to protect the mental health of employees.

Where previously only extreme management actions that caused catastrophic psychological harm created risk of legal liability; now, common workplace practices that create foreseeable risks of mental injury can lead to legal liability.

The Mental Health Commission of Canada (MHCC) has championed the development of a National Standard on Psychological Health and Safety in the Workplace.³⁰ It is a voluntary standard intended to provide systematic guidelines for Canadian employers that will enable them to develop and continuously improve psychologically safe and healthy work environments for their employees. It is anticipated that the standard will align with existing relevant standards or those currently under development.

The MHCC reports explain how Canadian courts and tribunals are increasingly intolerant of workplace factors that threaten psychological safety; ordering management to change workplace habits that threaten employees; and imposing dramatically increased financial punishments for transgressions. Following from the Shain reports is a compelling call to action for employers and policy makers.

What is termed a *perfect storm* of liability for employers who fail to maintain a psychologically safe workplace is building strength in the proceedings of courts and tribunals in seven different Canadian legal contexts: human rights, labour law, employment contracts, employment standards, occupational health and safety, workers compensation, and torts and damages (common law).

On January 16, 2013 Canada became the first country in the world to outline a voluntary national standard for Canadian workplaces. The National Standard of Canada titled Psychological Health and Safety in the Workplace³¹ - prevention, promotion and guidance to staged implementation is designed to help organizations and their employees improve workplace psychological health and safety. Developed in collaboration with the Canadian Mental Health Association and the Canada Standards Association this standard is presented as a journey for continual improvement, focused on promoting employees' psychological health and preventing psychological harm due to workplace factors.

It is estimated that Canada loses 51.8 billion in economic costs related to mental health with 69% of Long Term Disability Claims related to mental health issues (CMHA 2013). Further presenteeism (being physically present but not engaged) costs 1.5 times more than absenteeism. The workers' Compensation Board of British Columbia (WCB-BC) has expanded coverage for work-related mental disorders and an estimated 65% of Nova Scotia Human Rights complaints are related to the workplace. In the rationale for introducing the standard we can see there is a strong relationship between workplace bullying as a particular form of psychological harassment and as a mental health concern.

A number of workplace influences affect mental health at work and risk factors include work overload, unreasonable work pace, high demand/low control, conflicting tasks, and perceived unfairness. Protective factors include self-efficacy, skill discretion, decision authority, social support, civility and respect as well as unique human responses.

³⁰ http://www.mentalhealthcommission.ca/English/Pages/workplace_guide.aspx

³¹ <http://www.csa.ca/cm/ca/en/news/article/national-standard-of-canada-psychological-health-and-safety-in-the-workplace>

Thus workplace mental health requires both strategies to increase protective factors and reduce risk factors.

Psychological Health and Safety are demonstrated in the way that people regularly interact, to how working conditions and management practices are structured and how decisions are made and communicated. This requires the promotion of workers' psychological well-being as well as prevention of harm to workers' mental health in negligent, reckless or intentional ways.

The workplace culture serves to protect against harm or can increase risk factors. In respectful workplace cultures we find greater trust amongst workers and their employers resulting in higher levels of commitment to the organization. This is reflected in productivity gains, greater staff retention, higher levels of job satisfaction, lower levels of job related stress and less conflict between work and family responsibilities.

In workplaces where bullying behaviour is a cultural norm we find the following; escalation of incivility, high staff turnover, low morale, high levels of informal and formal complaint and grievances, inconsistent application of policies and rules, along with poor performance and reprisal of those who protest.

In underscoring the importance of a healthy and respectful culture we note that policies and procedures on their own do not address or prevent bullying. Leadership that demonstrates skills and confidence in addressing this issue are also required. High level commitment to making positive changes has a big influence on the culture of workplaces.

Leaders, whether in a supervisory or managerial role or workers' who are informal leaders, have significant input into the culture of an organization and can therefore demonstrate and model the standard of behaviour that is expected. As an aspect of corporate social responsibility this is demonstrated by the ability to be conscious of and notice incidents of subtle bullying, the ability to speak up constructively in that moment, and take complaints of bullying seriously.

It is leaders who are called upon to create a cultural shift toward psychologically healthy workplaces. However, effectiveness in this area requires an understanding of some common definitions contained in Canadian Labour practices e.g. Duty of Care, good faith, frivolous and vexatious, what is meant by reprisal free, and what we mean when we cite confidentiality; that is we provide clear information while acknowledging the right to privacy, dignity and respect of the individual. A psychologically healthy workplace requires demonstration of both tangible and 'soft' skills. Tangible or concrete skills are demonstrated through policy, key performance indicators, transparency, role clarity and job facts: While soft skills include relationship skills of negotiation, conflict resolution, problem solving, listening and role modeling.

A key reason why people do not return to work after illness or disability, or remain at work is how they have been treated. (Sullivan 2008) In other words do they feel they have been treated fairly? Research indicates that people may not like a decision however if they believe it has been handled in a fair and just way they are more willing to accept the outcome.³² A consideration in addressing both workplace bullying and workplace mental health is the perception of justice and fairness. As perceptions of injustice increase so does workplace bullying³³.

³² <http://www.beyondintractability.org/bi-essay/principles-of-justice> (April 2013).

³³ *Bullying and harassment in the Workplace, Developments in theory and Research*, Stole Einersen, Helge Hoel, Dieter Zapf, Gary Cooper, Sept 2012 accessed <https://play.google.com/books/reader>, April 2013.

Perceptions of Justice stem from an understanding of fairness and responsibility. In asking, “Is it fair?” we want to know that conduct is honest, respectful and of goodwill in the personal interactions or relationships between the parties. One way that fairness and justice is made visible or tangible is through policy, so that when we ask “who is responsible?” we want assurances about what are the processes, who makes the decisions and decides outcomes, and the how and why around decision making are explained.

Unions which have traditionally been seen to be about fairness and justice have recently come under scrutiny as being irrelevant or redundant. However, it can be reasoned there is renewed relevancy for a union role to:

- Demonstrate shared concern for worker well-being
- Create harassment and bully-free workplaces
- Help workers navigate through complaint and grievance processes
- Provide expertise to create accommodations that work
- Work with employee(s) and management to problem-solve and;
- Provide constructive solutions that also repair relationships
- Provide an ongoing resource

Strategies commonly used to deal with workplace bullying include; mediation, anti-bullying curriculum, self-esteem for bullies, assertiveness training for targets, more punitive discipline, anger management training for bullies and zero tolerance policies. However, short term, one off or single interventions will not be sustainable in preventing workplace bullying in the long term. The NSGEU Working Toward Bully-Free Workplaces Program fosters asking questions to help find solutions:

- What do you need from the workplace to be successful in your job? Eliciting information about the workplace culture is a key determination in whether bullying will occur
- How do you want future workplace issues to be addressed? Having a clear policy helps to define situations, is solutions based, and provides options for the earliest intervention
- For your contribution towards your success at work, what will you commit to? Participants are encouraged to think about their self-care, informal strategies at work as well as formal avenues provided through policy.

The NSGEU also advocates for Restorative Workplaces Practices. Relationships are relevant at all levels of human interaction; interpersonally, socially, institutionally and nation to nation. Therefore a restorative approach is a relational approach. Relationships are central between human beings and the world and can be positive/harmful or unhealthy/healthy. This approach is central; to recognizing, understanding and addressing harmful relationships. Our human rights and inequality and power disparity are relational, with our ability for respect and dignity grounded in understanding others.

Restorative practices in the workplace focuses on conditions in relationship that enable social equality; therefore the approach is constructive and forward thinking. The approach is more than settling interpersonal conflict, and more than alternative dispute resolution. Restorative practices work to establish and understand all perspectives as a prelude to problem solving, conflict resolution and repairing harm. It offers processes capable of supporting sustainable accommodation as a way of relating rather than an

outcome or entitlement. Quality of relationship requires mutual respect, concern, care and dignity at work thereby transforming social relationships.

In using a restorative approach, the principles of practice are relationship focused and inclusive, participatory, democratic and deliberative. The approach brings together the 'right' people that is, the people who need to come together. Comprehensive and holistic it is not only incident focused but considers the context and causes in order to be remedial and forward-focused.

Developing understanding of what happened, the effects among the people involved and to determine what is needed to move forward, a restorative conference on a continuum of informal to formal is organized to facilitate understanding among the participants (those affected). The purpose is also to understand why what happened matters; in other words what are the systemic issues. Addressing presenting systemic issues will increase perceptions of fairness while identifying concerns that need further clarification or attention. Understanding is necessary before reaching agreement on what needs to happen in order to move forward and to repair the harm.

According to the Nova Scotia Restorative Justice – community, university, research alliance (NSRJ-CURA) restorative practices not only prevents re-offending but serves to build capacity to deal with future concerns.

4.c. Restorative practices

A challenge is ensuring justice in any undertaking to redress workplace bullying. Perceptions of justice have been identified as a core value in most organizations and workplaces with significant negative consequences in employee behaviour, attitudes, and health when there is a perceived lack of objectivity or justice. Facets of justice concern the fairness of the outcome or the decision made following a complaint process: that there is a lack of bias in the investigation process of bullying and equal representation for the parties involved and the personal interactions between the parties. Interpersonal factors consider: did the parties conduct themselves with honesty, respect, and goodwill and were explanations provided about the hows and whys around decision making and outcomes.

While people who use bullying behaviours in the workplace need to be accountable the needs of those who have been harmed (targets) are often overlooked even when perpetrators are sanctioned. Not addressing the needs of those who have been harmed can leave them continuing to feel invisible. The emerging field of restorative practices gives those most affected by conflict the tools and principles needed to resolve problems and rebuild relationships. A Restorative Practices in the Workplace Program provides a means to resolve conflict while encouraging and supporting those who have caused harm to acknowledge the impact of what they have done, while offering an opportunity to repair the harm. It offers those who have been harmed the opportunity to have their harm acknowledged and amends made.

While a traditional approach looks at defining bullying and investigating measures of frequency and intensity with stronger policies as a guide to sanctions, in restorative practices based on restorative justice the focus is on understanding the harm that is done and how it can be repaired. Progressive discipline and sanctions remain an aspect to repair harm and reintegrate individuals into communities of work, while resolving the harm done prevents the behaviour from being repeated. Table 3, illustrates restorative practices and needs of stakeholders in the workplace.

Table 3: Restorative practices and needs of stakeholders in the workplace

Victims/Targets	Offenders	Community (Workplace)
<ul style="list-style-type: none"> • information • truth-telling/honesty • empowerment • restitution or vindication 	<ul style="list-style-type: none"> • accountability • encouragement to change/transform • encouragement & support to integrate into community • need for restraint 	<ul style="list-style-type: none"> • attention to concerns • opportunity to build community • mutual accountability • encouragement to show concern for one another • foster conditions that promote healthy communities/ workplaces • experience fair process

Conclusion

Based on the available Canadian research and the NSGEU experience employers appear eager to understand this workplace concern and want to know how to address this issue through appropriate policy, procedures, and best practices. Many employers have respectful workplace policies with a caveat stating that harassment and bullying in any form will not be tolerated. A clear and concise respectful workplace policy should outline all those qualities which are desirable in the workplace and that workplaces want to strive towards. However, violence in the workplace, harassment, and bullying policies should clearly articulate those things which are not desirable and that we want to move away from.

In Canada federal and provincial legislative provisions on occupational health and safety in the workplace are arguably broad enough to extend to both physical and psychological threats to health and safety at work. Increasingly, health and safety laws and/or regulations are being amended to clearly articulate that protection against workplace violence includes both physical and psychological threats to employee well-being. Interestingly, one Canadian survey on workplace violence found a greater likelihood of physical violence from outside sources and a higher incidence of psychological violence from within organizations.³⁴ While employers need to be attentive to the risks of violence in all of its manifestations, different policy responses may be needed in response to the specifics of the particular violence involved.

A common strategy is to focus on the occupational health and safety dimensions of the phenomenon of workplace violence, rather than its human rights dimensions. However, there appears to be a growing consensus that occupational health and safety regulations and laws should make explicit their concern with both physical and psychological well-being and safety at work. One identified weakness of exclusive reliance on occupational health and safety regulations is that they do not provide sufficient recourse where psychological harassment is occurring but has not caused an occupational injury.

³⁴ Canadian Initiative on Workplace Violence, *The National Labour Survey, Executive Summary* (Toronto: March 2000), online: Canadian Initiative for Workplace Violence.

One of the major reasons for the Quebec reform was repeated identification of this gap in protection in the government reports and consultations leading up to the reform. Individuals, particularly non-unionized employees, experiencing non-discriminatory psychological harassment did not have an accessible legislative mechanism for obtaining redress. Central to the legislative reform was a method of comprehensive, accessible individual protection from psychological harassment in workplaces across Quebec. To that extent, it was understood as a baseline labour standard to be assured to all individuals.

In terms of human rights, as well as legislative and labour standards reform, one possible change would be a revision of human rights legislation on harassment to eliminate the requirement that it be linked to a ground of discrimination. It might be more useful to consider increasing their scope to encompass fundamental individual rights and freedoms.

In reference to the dealing with stress/violence intervention programs offered within organizations to deal with the consequences of workplace bullying, Hoel, et al state, "At the same time an analytical approach as opposed to statistical generalisation would allow looking at similar problems in different contexts and from different angles in order to analyse to what extent results tend to converge."³⁵ These same principles could be applied to Canadian provincial and national jurisdictions.

Holding to Canadian diversity in many respects there appears to be lack of clear guidelines and lack of systematic data collection based on Canadian information. With the lack of systematic evaluation, the potential success of interventions may be missed due to lack of such assessment. Finally, most law reform initiatives and research reports on workplace violence emphasize the need to be attentive both to individual wrongdoing and to systemic or organizational dimensions which reinforce risks of workplace violence. However, there is also widespread agreement that preventive workplace strategies are essential to support the right to integrity and the right to dignity at and through work.

Resources:

<http://www.csa.ca/cm/ca/en/news/article/national-standards-of-canada-psychological-health-and-safety-in-the-workplace>

www.BullyingCanada.ca

www.bullying.org

Canada Charter of rights and Freedom http://laws-lois.justice.gc.ca/eng/Const/Const_index.html

Canadian Human Rights Commission <http://www/chrc-ccdp.ca>

Canada labour code <http://laws-lois.justice.gc.ca/eng/regulations/SOR-86-304/FullText.html>

Canada Safety Council: <https://canadasafetycouncil.org>

Canada Safety Council: www.safety-council.org/info/OSH/bullies.htm

Ontario Ministry of labour <http://www.labour.gov.on.ca/english/hs/pubs/index.php>

www.PREVNet.ca

Centre for Occupational Health and Safety <http://www.ccohs.ca>

<http://www.workplaceviolence.ca/legislation/>

<http://www.workplace-violence.info>

ns.ca/lae/healthandsafety/pubs.asp

³⁵ Helge Hoel, Kate Sparks & Cary L. Cooper. the Cost of violence/Stress at Work and the Benefits of a Violence/Stress-Free Working Environment Report Commissioned by the International labour organization (ILO) Geneva. January 1, 2001 (54) http://www.ilo.org/safework/info/publications/WCMS_118190/lang--en/index.htm.

Statistics Canada <http://www.statcan.gc.ca>

<http://alis.alberta.ca>

Canadian Nurses Union,

http://www.nursesunions.ca/sites/default/files/Bullying_Position_Statement.pdf

Canadian Institute of Health Research <http://www.cihr-irsc.gc.ca/e/45838.html>

C.N. Centre for Occupational Health and Safety <http://www.smu.ca/cn>

Workplace Bullying Institute <http://www.workplacebullying.org>

<http://www.bullyonline.org/workbully/canada.htm>

<http://bullyinworkplace.com/2010/03/13/canada-takes-on-workplace-bullies/>

www.nsgeu.ca

Valerie Cade, Bully Free at Work. www.bullyfreeatwork.com

www.mebntalhealthworks.ca/wti/understanding_needs

<http://www.jfo.org.uk/campaign/country/ca.htm#>

<http://www.beyondintractability.org/bi-essay/principles-of-justice> (April 2013)

sullivan-painresearch.mcgill.ca/ieq.php

Brotheridge, CM, and Lee, RT (2005). Impact of work-family interference on general well-being: A replication and extension. *International Journal of Stress Management*, 12 , 203-221.

Brotheridge C.M. and Lee R.T., "When prey turns predatory: Workplace bullying as predictor of counteraggression / bullying, coping, and well-being" *European Journal of Work and Organizational Psychology*. 2006, 00 (0): 1-26.

Cowie, Helen, et al. Measuring workplace bullying. *Journal of Aggression and Violent Behaviour*. 7 (2002) 33-51.

Eineren, Stole, Hoel, Helge, Zapt, Dieter, Cooper, Gary. *Bullying and harassment in the Workplace, Developments in theory and Research*, Sept 2012 accessed <https://play.google.com/books/reader>, April 2013

Gladwell, Malcolm. *Outliers, the Story of Success*, Back Bay Books, Little, Brown and company, New York, 2008.

Helge Hoel, Kate Sparks & Cary L. Cooper. *the Cost of violence/Stress at Work and the Benefits of a Violence/Stress-Free Working Environment Report* Commissioned by the International labour organization (ILO) Geneva. January 1, 2001

http://www.ilo.org/safework/info/publications/WCMS_118190/lang--en/index.htm

Namie, Dr. Gary & Dr. Ruth *The Bully at Work what you can do to stop the hurt and reclaim your dignity on the job*. <http://www/workplacebullying.org>

APPENDICES

Appendix A. Legislation by province



The following table is adapted from *The Canadian Initiative on Workplace Violence*, copyright 2010,

<p><u>FEDERAL Legislation</u></p> <p>Relevant Statutes: Canada Labour Code, R.S.C. 1985, c. L-2 [‘CLC’] Canada Occupational Health and Safety Regulations, S.O.R./86-304[‘COHRS’]</p> <p>Websites: www.labour.gov.on.ca www.ohrc.on.ca (Ontario Human Rights Commission)</p>	<p>Workplace Violence Definition: ... “any action, conduct, threat or gesture of a person towards an employee in their workplace that can reasonably be expected to cause harm, injury or illness to that employee.” (COHRS, s. 20.2)</p> <p>Bill C-451 - An act to prevent psychological harassment in the workplace in Canada Bill C-451, an act to prevent Psychological Harassment and workplace bullying has passed its first reading in the house of commons in Canada in September 2003. Designed to amend the Canadian Labour code it did not pass final reading in 2004</p>
<p>PROVINCIAL Legislation</p>	<p>Workplace Violence Definition:</p>
<p><u>British Columbia</u></p> <p>Relevant Statutes: Workers Compensation Act, SBC 2002, C. 56 Occupational Health and Safety Regulations, B.C. Reg 296/97</p>	<p>... attempted or actual exercise of physical force by a person other than a worker, so as to cause injury to a worker, and includes any threatening statement or behaviour which causes a worker to reasonably believe he/she is at risk.” (OHSR, s. 4,27). New legislation came into effect July 2012.</p>

<p>[‘OHSR’]</p> <p>Websites: http://www.worksafebc.com/</p>	
<p><u>Alberta</u></p> <p>Relevant Statutes: Occupational Health and Safety Act, R.S.A. 2000, cO-2 Occupational Health and Safety Code, Part 27 Occupational Health and Safety Code [‘Code’] sections 389-392</p> <p>Websites: http://employment.alberta.ca</p>	<p>... “the threatened, attempted or actual conduct of a person that causes or is likely to cause physical injury.” (Code s.1)</p>
<p><u>Saskatchewan</u></p> <p>Relevant Statutes: Occupational Health and Safety Act, R.S.A. 2000, cO-2 Occupational Health and Safety Code, Part 27 Occupational Health and Safety Code [‘Code’] sections 389-392</p> <p>Websites: http://www.labour.gov.sk.ca/</p>	<p>... “the exercise of physical force by a person against a worker in a workplace that causes or could cause physical injury to the worker, or an attempt to exercise physical force against a worker in a workplace that could cause physical injury to the worker” (Regs, s.37)</p> <p>Workplace Harassment Definition:... “inappropriate conduct, comment, display, action or gesture based on race, creed, religion, colour, sex, sexual orientation (or other protected grounds) that adversely affects the worker's psychological or physical well-being; or constitutes a threat to the worker’s health or safety. Must be repeated conduct, or single incident that causes lasting harmful effects.” (OHSA, s 2(1); s. 2(3))</p>
<p><u>Manitoba</u></p> <p>Relevant Statutes: Workplace Safety and Health Act (C.C.S.M. c.W210) Workplace Safety and Health Regulation (Parts 8-11) [‘WSHR’] The Domestic Violence and Stalking Act (C.C.S.M. c. D93)</p> <p>Websites: http://www.gov.mb.ca/labour/</p>	<p>... “means (a) the attempted or actual exercise of physical force against a person; and (b) any threatening statement or behaviour that gives a person reasonable cause to believe that physical force will be used...” (WSHR, s.1)</p> <p>Domestic Violence Definition: ... “ an intentional, reckless or threatened act or omission that causes bodily harm or property damage; an intentional, reckless or threatened act or omission that causes a reasonable fear of bodily harm or property damage; conduct that reasonably, in all the circumstances, constitutes psychological or emotional</p>

	<p>abuse; forced confinement, and sexual abuse.” (Subsection 2(1.1))</p> <p>Workplace Harassment Definition: “...behaviour of a person, either by repeated conduct, comments, displays, actions or gestures, or by a single serious comment, display, action, gesture or occurrence of conduct, that is (i) unwelcome, vexatious, hostile, inappropriate or unwanted, (ii) based on race, creed, religion, skin colour, sexual orientation, marital status, family status, disability, physical size or weight, age, nationality, ancestry or place of origin, or (iii) an improper use of the power or authority inherent in the person’s position, and threatens the health or safety of the worker, endangers a worker’s job or threatens the economic livelihood of the worker, undermines the worker’s job performance or negatively interferes with the worker’s career in any other way, adversely affects the worker’s dignity or psychological or physical integrity, or results in a harmful workplace for the worker.” (OHSR, s. 2(1); s. 2(3))</p>
<p><u>Ontario</u></p> <p>Relevant Statutes: Occupational Health and Safety Act, [R.S.O. 1990, Chapter 0.1]</p> <p>Websites: www.labour.gov.on.ca www.ohrc.on.ca (Ontario Human Rights Commission)</p>	<p>...“ workplace violence is defined as (1) the exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker; (2) an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker; or, (3) a statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker.”</p> <p>Workplace Harassment Definition: ...“ as engaging in a course of vexatious comment or conduct against a worker, in a workplace – behaviour that is known or ought reasonably to be known to be unwelcome.”</p> <p>Domestic Violence Definition: ...“If an employer becomes aware, or ought reasonably to be aware, that domestic violence that would likely expose a worker to physical injury may occur in the workplace, the employer shall take every precaution reasonable in the circumstances for the protection of the worker”.(2009, c. 23, s. 3)</p>

<p><u>Quebec</u></p> <p>Relevant Statutes: An Act Respecting Labour Relations, R.S.Q., c. N-1.1 [‘LS Act’] An Act Respecting Occupational Health and Safety, R.S.Q., c. 2-1.1 [‘OHS Act’] Regulation Respecting Occupational Health and Safety, c. S-2.1, 2.19,01</p> <p>Websites: www.csst.qc.ca</p>	<p>Workplace violence is not defined</p> <p>Psychological Harassment Definition: ...“ means any vexatious behaviour in the form of repeated and hostile or unwanted conduct, verbal comments, actions, or gestures, that affects an employee’s dignity or psychological or physical integrity and that results in a harmful work environment for the employee”.</p> <p>Language written into collective agreements of unionized employees</p>
<p><u>New Brunswick</u></p> <p>Relevant Statutes: Occupational Health and Safety Act, S.N.B. 1983, c. 0-0.2 [‘OHSA’] Code of Practice for Working Alone Regulation - Health and Safety Act. N.B., Reg. 92-133</p> <p>Websites: http://www.worksafenb.ca/</p>	<p>No definition regarding workplace violence at this time.</p>
<p><u>Prince Edward Island</u></p> <p>Relevant Statutes: Occupational Health and Safety Act, R. S.P.E.I. 1988, c. 0-1.01 [‘OHSA’] General Regulations, P.E.I. Reg. EC180/87 [‘GR’]</p> <p>Websites: http://www.wcb.pe.ca/</p>	<p>...“ the threatened, attempted or actual exercise of physical force that may cause injury to a worker, and includes any threatening statement or behaviour that gives a worker reasonable cause to believe that he or she is at risk of injury.” (GR. s. 52.1)</p>
<p><u>Nova Scotia</u></p> <p>Relevant Statutes: Occupational Health and Safety Act, S.N.S. 1996. c. 7 Violence in the Workplace Regulations, N.S. Reg. 209/2007</p>	<p>...”threats, including threatening behaviour, that gives an employee reasonable cause to believe that he or she is at risk of physical injury, or conduct (or attempted conduct) that endangers the physical health or physical safety of an employee.” (VWR, s. 2)</p> <p>Nova Scotia is working on domestic violence in the workplace as well as workplace mental health initiatives, however these are voluntary</p>

<p>Websites: www.gov.ns.ca/enla/ohs</p>	
<p><u>Newfoundland Labrador</u></p> <p>Relevant Statutes: Occupational Health and Safety Act, R. S.N.L. 1990, c. 0-3 ['OHSA']</p> <p>Websites: http://www.whscc.nf.ca/</p>	<p>No legislation regarding workplace violence at this time.</p>
<p><u>Nunavut</u></p> <p>Relevant Statutes: Nunavut Act. S.C. 1993, c 28 * The Nunavut Act. adopts as law ordinances of the NWT regarding Occupational Health and Safety</p> <p>Websites: http://www.gov.nu.ca/</p>	<p>No legislation regarding workplace violence at this time.</p>
<p><u>Northwest Territories</u></p> <p>Relevant Statutes: Safety Act. R.S.N.W.T. 1988, c. S-1 ['SA']</p> <p>Websites: http://www.gov.nt.ca/</p>	<p>No legislation regarding workplace violence at this time.</p>
<p><u>Yukon</u></p> <p>Relevant Statutes: Occupational Health and Safety Act, R.S.Y. 2002, c. 159 ['OHSA']</p> <p>Websites: http://www.gov.yk.ca/</p>	<p>No legislation regarding workplace violence at this time.</p>

Appendix B. Organizations dealing with children and youth

<p>Bullying.org is dedicated to increasing the awareness of bullying and to preventing, resolving and eliminating bullying in society. Founder Bill Belsey</p>	<p>Bullying.org is a collaborative project that has three goals which are to help people understand that;</p> <ul style="list-style-type: none"> • they are not alone in being bullied, • being bullied is not their fault, and • there are many positive alternatives to dealing with bullying.
<p>BullyingCanada was created on December 17, 2006 by Katie Neu, and Rob Frenette, in order to provide support, information and resources on the topic of bullying.</p> <p>BullyingCanada also provides a 24/7 telephone support service: 1-877-352-4497 or by email: support@bullyingcanada.ca</p>	<p>Vision is to ensure there are proper laws in place to protect and help victims, bystanders, bullies, parents, school officials and the community at large to understand, deal with, handle and end bullying. We are the first youth created anti-bullying website in Canada</p>
<p>PREVNet (Promoting Relationships and Eliminating Violence Network) is Canada's authority on research and resources for bullying prevention. PREVNet is an umbrella network of 65 leading Canadian research scientists, more than 90 graduate students, and 52 youth-serving organizations.</p> <p>Launched in 2006 with the Networks of Centres of Excellence, PREVNet's mission is to stop bullying in Canada and to promote safe and healthy relationships for all Canadian children and youth. Led by Scientific Co-directors Dr. Debra Pepler of York University and Dr. Wendy Craig of Queen's University. PrevNet.ca</p>	<p>Calling for a National Strategy. The PREVNet partnership model grew out of Canadians' concerns about bullying and commitment to address these problems effectively. PREVNet is building a diversity of partnerships to ensure that consistency in education, assessment, intervention, and policies pertaining to bullying and to respond to the experiences and needs of all Canadian children and youth regardless of diversity such as gender, disability, ethno-racial-cultural background, sexual orientation, and economic disadvantage. The PREVNet partnership model brings expert researchers and national organization together to address issues related to bullying.</p>
<p>Children's Rights Canada has signed the United Nations Convention on the Rights of the Child. In Article 29, the Convention specifies that education shall be directed to: The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of the sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin.</p>	<p>As a society, therefore, we must educate children to ensure they develop positive attitudes and behaviours and avoid using their power to bully or harass others. The UN Convention on the Rights of the Child also addresses the rights of children who are at the receiving end of bullying and harassment. Article 19 of the Convention states:</p>

	<p>Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.</p>
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Workplace Bullying and the Law: A Report from the United States

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I. America addresses workplace bullying

A. From Europe to America

Although workplace bullying presumably has existed ever since people started working in groups and organizations, the term is comparatively new to American employee relations. Our initial understanding of this phenomenon comes from Europe, and most researchers agree that the work of the late Heinz Leymann, a Swedish psychologist and professor, during the 1980s constituted the starting point for conceptualizing and understanding it. Leymann drew on his experience as a family therapist and began investigating “direct and indirect forms of conflicts in the workplace.”¹ He used the term “mobbing” to describe the kinds of hostile behaviors that were being directed at workers. His pioneering research is considered to be among the seminal works on psychological abuse in the workplace.²

Andrea Adams, a British journalist, popularized the term “workplace bullying” in the 1980s and early 1990s, using a series of BBC radio documentaries to bring the topic to a more public audience. In 1992 she authored what may have been the first book to use “bullying” at work as its operative term.³ She observed that even though workplace bullying “like a malignant cancer” and that “the majority of the adult population spends more waking hours at work than anywhere else,” the manifestations of this form of abuse “are widely dismissed.”⁴

The husband and wife team of Gary and Ruth Namie, two psychology Ph.D.s, would introduce “workplace bullying” into the vocabulary of American employee relations, starting in the late 1990s. Gary was a social psychologist with a background in college teaching and organizational development, while Ruth was a licensed clinical therapist. They learned firsthand about workplace bullying during the 1990s, when Ruth endured it at her workplace. Eager to understand more about what she was experiencing, the couple did some

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¹ Stale Einarsen, *et al.*, The Concept of Bullying at Work: The European Tradition, in *BULLYING AND HARASSMENT IN THE WORKPLACE: DEVELOPMENTS IN THEORY, RESEARCH, AND PRACTICE* 6 (STALE EINARSEN, HELGE HOEL, DIETER ZAPF, AND CARY L. COOPER, EDs., 2011).

² For representative examples of Leymann’s work, see Heinz Leymann, The Content and Development of Mobbing at Work, 5 No. 2 *EUROPEAN JOURNAL OF WORK AND ORGANIZATIONAL PSYCHOLOGY* 165 (1996); Heinz Leymann and Annelie Gustafsson, Mobbing at Work and the Development of Post-traumatic Stress Disorders, 5 No. 2 *EUROPEAN JOURNAL OF WORK AND ORGANIZATIONAL PSYCHOLOGY* 251 (1996).

³ ANDREA ADAMS WITH NEIL CRAWFORD, *BULLYING AT WORK: HOW TO CONFRONT AND OVERCOME IT* (1992)

⁴ *Id.* at 9.

research and discovered the works of Andrea Adams, Heinz Leymann, and other European writers and scholars. They decided that an American campaign of research and education was necessary to expose this widespread form of common mistreatment at work, and they chose to use the term bullying because they believed it would resonate with the public.

The Namies' work coincided with the emergence of the Internet as a medium for sharing and exchanging information, and so they began the Campaign by launching their "Bullybusters" website in 1998. Their first book, *Bullyproof Yourself at Work! Personal Strategies to Stop the Hurt From Harassment*, would be published in 1999.⁵ They also organized and hosted "Workplace Bullying 2000," the first U.S. conference on workplace bullying. The conference, which was held in Oakland, featured presentations from an international assemblage of practitioners, academicians, and bullying targets. Their work continues to this day, under a renamed organizational rubric they named the Workplace Bullying Institute.⁶

From the outset, the Namies began to work with a small number of North American academicians who were doing researching issues related to bullying, including Loreleigh Keashly, a social psychologist from Wayne State University in Detroit, Joel Neuman, an organizational behavior specialist at the State University of New York at New Paltz, and Ken Westhues, a sociologist at the University of Waterloo in Canada. (I first contacted the Namies in 1998 and asked whether they had examined the legal and policy implications of workplace bullying. This would be the beginning of our ongoing collaboration.)

Since those early efforts, workplace bullying has entered the lexicon of American employment relations. Leading newspapers and periodicals have devoted feature articles to the topic. Segments about workplace bullying have appeared on leading local and national electronic media. Workplace bullying is a topic of increasing popularity among human resources, business management, and employment relations practitioners. The Internet is rife with websites and blogs devoted to workplace bullying and similar topics. Buttressing these developments has been the emergence of a growing multidisciplinary network of scholars who are devoting their attention to workplace bullying, especially from fields such as psychology and organizational behavior.

B. Workplace bullying, American Employment Law, and the Healthy Workplace Bill

Despite the growing recognition of the harm caused by severe workplace bullying, many targets of this behavior have little recourse under law. Overall, workplace bullying remains the most neglected form of serious worker mistreatment in American employment law. However, there are many emerging signs of change. Workplace bullying has been the topic of major articles in bar association journals, legal newspapers, and legal newsletters, including the *ABA Journal*, *National Law Journal*, *Lawyers USA*, and *U.S. Law Week*, among others.⁷ It has been a featured topic at national programs sponsored by groups such as the Association of American Law Schools, National Employment Lawyers Association, and Labor and

⁵ GARY NAMIE & RUTH NAMIE, *BULLYPROOF YOURSELF AT WORK!* (1999).

⁶ For more information, see www.workplacebullying.org.

⁷ Wendy N. Davis, No Putting Up with Putdowns, *ABA JOURNAL*, February 2008, 16; Tresa Baldus, States take aim at taming 'bully bosses,' *NAT'L L. J.*, April 9, 2007, 4; Justin Rebello, States weigh anti-bullying laws, *LAWYERS USA*, March 12, 2007; Eric Matusewitch, Workplace Bullying Increasingly Surfacing in Courts and Legislatures, 78 *NO. 10 U.S. LAW WEEK* 2151 (Sept. 22, 2009).

Employment Relations Association. The legal blogosphere has shown growing interest as well. In 2009, the American Bar Association's legal practice management newsletter listed workplace bullying as among the reasons why employment law was likely to remain a "hot" area of practice during the coming year.⁸

Workplace bullying is becoming a more frequent subject of commentary in law review articles. Many of these scholarly forays, especially the initial commentaries, have been intertwined with the very American paradigm of mistreatment on the basis of protected class status, especially questions of sex and gender.⁹ In view of the great attention we have given to matters of difference over the past 50 years, it is understandable that these perspectives have served as something of point of entry for examining workplace bullying in the United States. Scholars are also looking to European legal responses to bullying for insights that might inform American initiatives.¹⁰ More recently, law student articles discussing workplace bullying have appeared in the legal literature.¹¹

In terms of proposals for law reform, the most significant development has been state legislative consideration of versions of the Healthy Workplace Bill, model legislation I have authored that provides targets of severe workplace bullying with a claim for damages and creates liability-reducing incentives for employers to act preventively and responsively toward bullying behaviors. Although the legislation has yet to be enacted, it has been introduced in some 20 state legislatures since 2003, and support for it is growing.

Before discussing the Healthy Workplace Bill in greater detail, however, it may be useful to outline existing potential legal claims and liability risks for severe bullying behaviors at work.

II. Intentional tort theories

A. Intentional infliction of emotional distress

A favored tort law theory for seeking relief against emotionally abusive treatment at work has been intentional infliction of emotional distress ("IIED"). Typically, plaintiffs have sought to impose liability for IIED on both their employers and the specific workers, often supervisors,

⁸ Robert W. Denney, What's Hot and What's Not in the legal profession, 35 No. 1 LAW PRACTICE 12 (Jan./Feb. 2009), available at <http://www.abanet.org/lpm/magazine/articles/v35/is1/pg12.shtml>

⁹ For example, one of the earliest works on the tort of intentional infliction of emotional distress in the employment context emphasized the racial, gender, and class dynamics of abusive work environments. See Regina Austin, Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress, 41 STANFORD L. REV. 1, 37-42 (1988). See also Rosa Ehrenreich, Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment, 88 GEORGETOWN LAW JOURNAL 1 (1999); Catherine L. Fisk, Humiliation at Work, 8 WILLIAM & MARY JOURNAL OF WOMEN AND THE LAW 73 (2001); Gabrielle S. Friedman & James Q. Whitman, The European Transformation of Harassment Law: Discrimination Versus Dignity, 9 COLUMBIA JOURNAL OF EUROPEAN LAW 241 (2003); Brady Coleman, Pragmatism's Insult: The Growing Interdisciplinary Challenge to American Harassment Jurisprudence, 8 EMPLOYEE RIGHTS AND EMPLOYMENT POLICY JOURNAL 239 (2004); Ann C. McGinley, Creating Masculine Identities: Bullying and Harassment "Because of Sex," 79 COLO. L. REV. 1151 (2008); Kerri Lynn Stone, From Queen Bees and Wannabes to Worker Bees: Why Gender Considerations Should Inform the Emerging Law of Workplace Bullying, 65 N.Y.U. ANN. SURV. AM. L. 35 (2009).

¹⁰ Friedman & Whitman, *supra* note 9; Brady Coleman, Shame, Rage and Freedom of Speech: Should the United States Adopt European "Mobbing" Laws?, 35 GEORGIA J. INT'L & COMP. L. 53 (2006); Susan Harthill, Bullying in the Workplace: Lessons from the United Kingdom, 17 MINN. J. INT'L L. 247 (2008);

¹¹ Note, Jordan F. Kaplan, Help is on the Way: A Recent Case Sheds Light on Workplace Bullying, 47 HOUSTON L. REV. 141 (2010); Note, Joanna Canty, The Healthy Workplace Bill: A Proposal to Address Workplace Bullying in Massachusetts, 43 NEW ENGLAND L. REV. 493 (2009); Note, Amanda E. Leuders, You'll Need More than a Voltage Converter: Plugging European workplace Bullying Laws into the American Jurisprudential Outlet, 25 ARIZONA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 197 (2008).

who engaged in the alleged conduct. The tort of IIED is typically defined this way:¹²

1. The wrongdoer's conduct must be intentional or reckless;
2. The conduct must be outrageous and intolerable in that it offends against the generally accepted standards of decency and morality;
3. There must be a causal connection between the wrongdoer's conduct and the emotional distress; and
4. The emotional distress must be severe.

When I began researching what would become my first article on workplace bullying and American employment law, I hypothesized that IIED would be a primary and effective legal claim for bullied workers. However, my extensive survey and analysis of state case law, concentrating on the period 1995-98, revealed that typical workplace bullying, especially conduct unrelated to sexual harassment or other forms of status-based discrimination, seldom results in liability for IIED. In many instances, trial courts granted defense motions for dismissal or summary judgment, and the appellate courts affirmed.

IIED Claims (Summary of study concentrating on 1995-98 cases)

The most frequent reason given by courts for rejecting workplace-related IIED claims was that the complained-of behavior was not sufficiently extreme and outrageous to meet the requirements of the tort. Here are some examples:

Not Sufficiently Extreme and Outrageous

- In *Turnbull v. Northside Hospital, Inc.*,¹³ the Georgia Court of Appeals found that alleged conduct including “glaring at plaintiff with purported anger and contempt, crying, slamming doors, and snatching phone messages from plaintiff’s hand was childish and rude,” but that “it is not the type of behavior for which the law grants a remedy.” The court found persuasive the absence of cursing, derogatory remarks about the plaintiff, and verbal and physical threats.
- In *Denton v. Chittendon Bank*,¹⁴ the Vermont Supreme Court affirmed summary judgment entered for an employer and a supervisor where the plaintiff alleged that the supervisor “embarked on an insulting, demeaning, and vindictive course of conduct toward [the plaintiff] that included ridicule, invasions of privacy, intentional interference with ability to car pool, competitiveness in afterwork sports, and an unreasonable workload.” Liability should not be extended for “a series of indignities,” wrote the court, adding that “(a)bsent at least one incident of behavior” such as retaliation or an act of extreme humiliation, “incidents that are in themselves insignificant should not be consolidated to arrive at the conclusion that the overall conduct was outrageous.”
- In *Mirzaie v. Smith Cogeneration, Inc.*,¹⁵ the Oklahoma Court of Civil Appeals affirmed a trial court’s dismissal of an IIED claim where the plaintiff had alleged that his supervisor, among other things, yelled at him in front of other company

¹² Kroger Co. v. Willgruber, 920 S.W.2d 61 (Ky. 1996).

¹³ 220 Ga. App. 883, recon. den., cert. den. (1996).

¹⁴ 655 A.2d 703 (Vermont 1994).

¹⁵ 1998 WL 184582 (Okla.App. 1998).

executives, called him at 3:00 a.m. and “browbeat him for hours,” required him to “needlessly cancel vacation plans,” refused to allow the plaintiff to spend a day at the hospital with his wife after the birth of their son, intentionally called plaintiff’s wife by the plaintiff’s former wife’s name, and delivered the notice of termination two hours before the plaintiff’s wedding. There was nothing “in this working milieu,” said the court, “that would elevate the recited facts to the ‘outrageous’ level.”

- One of the most wrongheaded interpretations of IIED doctrine in the employment context came in *Hollomon v. Keadle*,¹⁶ an Arkansas Supreme Court case that involved a female employee, Hollomon, who worked for a male physician, Keadle, for two years before she voluntarily left the job. Hollomon claimed that during this period of employment, “Keadle repeatedly cursed her and referred to her with offensive terms, such as ‘white nigger,’ ‘slut,’ ‘whore,’ and ‘the ignorance of Glenwood, Arkansas.’” Keadle repeatedly used profanity in front of his employees and patients, and he frequently remarked that women working outside of the home were “whores and prostitutes.” According to Hollomon, Keadle threatened her with severe bodily harm “if she quit or caused trouble.” Hollomon claimed that she suffered from “stomach problems, loss of sleep, loss of self-esteem, anxiety attacks, and embarrassment.” On these allegations, the Arkansas Supreme Court affirmed summary judgment for the defendant Keadle. Skirting the question of whether Keadle’s conduct was outrageous on its face, the Court held that Hollomon’s failure to establish that Keadle “was made aware that she was ‘not a person of ordinary temperament’ or that she was ‘peculiarly susceptible to emotional distress by reason of some physical or mental condition or peculiarity,’” was fatal to her claim.

Insufficient Emotional Distress

Plaintiffs also can lose their IIED claims because they did not show the requisite level of severe emotional distress, as this case shows:

- *Harris v. Jones*,¹⁷ is a compelling illustration of the difficulty of establishing severe emotional distress. Plaintiff Harris was an assembly-line worker who suffered from a lifelong stuttering problem. During a five-month period, Harris’ supervisor and co-workers continually mimicked, verbally and physically, his speech impediment. As a result of this behavior, “Harris was ‘shaken up’ and felt ‘like going into a hole and hide.’” Jones’ wife said that his nervous condition worsened during this time. At trial, the jury found for Harris, but the trial court reversed the judgment, holding that the plaintiff’s emotional distress lacked the requisite severity to allow recovery. The Maryland appeals court then affirmed the trial court’s reversal of the verdict. Even though agreeing with Harris that Jones’ conduct was cruel and insensitive, the court found that the humiliation suffered by Harris was not, “as a matter of law, so intense as to constitute the ‘severe’ emotional distress required to recover” for IIED.

More Promising Factual Scenarios

Although typical workplace bullying alone usually does not result in IIED liability, the

¹⁶ 326 Ark. 168 (1996).

¹⁷ 380 A.2d 611 (Md. Ct.App. 1977).

presence of an aggravating factor may rescue what otherwise is likely to be an unsuccessful claim. These factors are discussed immediately below:

Status-Based Discrimination and Harassment

The most successful types of workplace-related IIED claims are those grounded in allegations of severe status-based harassment or discrimination. This may be of crucial significance in cases where the typically short statute of limitations governing a statutory harassment or discrimination claim has expired. Here are two examples where plaintiffs were able to bring an IIED claim:

- In *Soto v. El Paso Natural Gas Co.*,¹⁸ the Texas Court of Appeals reversed summary judgment entered for the defendant on both IIED and statutory harassment counts where the supervisory employee's alleged conduct included fondling and ridiculing a female employee following her return to work from a second mastectomy and reconstructive surgery.
- In *Takaki v. Allied Machine Corp.*,¹⁹ the Hawaii Court of Appeals reversed summary judgment entered for the defendant on both IIED and statutory discrimination counts where, among other things, the supervisor frequently called the plaintiff a "lousy f--king Jap."

Despite these holdings, it is important to note that many IIED claims based upon allegations of harassment or discrimination are dismissed, even where accompanying statutory claims based on the same facts are upheld. For example:

- In *Jeremiah v. Yanke Machine Shop, Inc.*,²⁰ the Idaho Supreme Court upheld a hostile work environment claim based on national origin while dismissing an IIED claim where at trial the plaintiff presented evidence that he was subjected to demeaning epithets and harassment regarding his national origin. The court avoided addressing whether the behavior was extreme and outrageous, instead finding that because the plaintiff was merely "seriously frustrated" by the treatment, he did not meet the requisite level of severe emotional distress to maintain his IIED claim.
- In *Hoy v. Angelone*,²¹ a Pennsylvania trial court dismissed an IIED claim following a jury verdict for the plaintiff, after the plaintiff had testified that she was subjected to various forms of abusive treatment, including sexual propositions, necessitating psychiatric help. The court found that absent a factor such as retaliation for refusing sexual advances, sexual harassment does not constitute outrageous conduct sufficient to support an IIED claim.

Retaliation

When abusive behavior appears to be motivated by a desire to retaliate against an employee who has reported illegalities or irregularities, a court may find that it constitutes extreme and outrageous conduct.

¹⁸ 942 S.W.2d 671 (Tex. Ct.App. 1997).

¹⁹ 951 P.2d 507 (Haw. Ct.App. 1998).

²⁰ 953 P.2d 992 (Idaho 1998).

²¹ 691 A.2d 476 (Pa. Super.Ct. 1997).

- In *Vasarhelyi v. New School for Social Research*,²² a New York appeals court reinstated an IIED claim brought by a former university controller and treasurer who had questioned the university president's handling of reimbursements for his personal and business expenses. The court found that the plaintiff had pleaded a valid IIED claim where, after she complained about the president's actions, she had been subjected to intense, lengthy interrogation, humiliation over her English language ability, questions about her personal relationships, and the "impugning both her honesty and her chastity."
- Similarly, in *Polk v. Inroads/St. Louis, Inc.*,²³ a Missouri appeals court reinstated an IIED claim where the plaintiff was subjected to "a calculated plan to cause . . . emotional harm" after she exposed misrepresentation by her supervisor.

B. Intentional interference with the employment relationship

Another tort law theory that potentially may be raised as a response to workplace bullying is intentional interference with the employment relationship, which is defined this way:

1. The plaintiff had an employment contract with an employer;
2. A third party knowingly induced the employer to break that contract;
3. The third party's interference was both intentional and improper in motive or means; and,
4. The plaintiff was harmed by the third party's actions.²⁴

Where available, this claim is brought directly against the offending co-employee. More specifically, in some states one can argue that the "third party" is a supervisor or co-worker who is acting outside of the scope of his employment relationship when he bullies an employee.²⁵

However, there are potential difficulties in raising this cause of action. First, not all state courts agree that a current employee qualifies as the "third party" necessary to invoke this legal theory.²⁶ Second, the law may not allow a bullied employee to sue the employer under this theory, as the Oregon Court of Appeals reasoned in *Lewis v. Oregon Beauty Supply Co.*,²⁷ when it held that a "company cannot be liable for interference with an employment relationship to which it is a party."

C. Other intentional torts

Common law torts such as assault, battery, and false imprisonment may be applicable to certain bullying cases. However, unless such a case is accompanied by severe physical and/or mental harm, it may be impractical to bring an action. In rare cases, defamation claims may be viable as well. Furthermore, the preemptive effect of workers' compensation statutes must certainly be considered in this context.

²² 230 A.D.2d 658 (N.Y. App.Div. 1996).

²³ 951 S.W.2d 646 (Mo. App. 1997).

²⁴ *Shea v. Emmanuel College*, 425 Mass. 761 (1997).

²⁵ *See e.g.*, *O'Brien v. New England Telephone & Telegraph Co.*, 422 Mass. 686 (1996) (holding that a supervisor could be liable for engaging in a course of abusive, bullying conduct towards the plaintiff that was unrelated to the company's corporate interests).

²⁶ *E.g.*, *Miles v. Bibb Co.*, 177 Ga.App. 364 (1985), *reh. den.*, *cert. disp.* (1986) (holding that neither supervisor nor human resources director was a third party unauthorized to discharge plaintiff).

²⁷ 77 Or.App. 663, *recon. den.* (1986).

D. Preemption by workers' compensation

Finally, we must consider the effect of workers' compensation laws on tort claims. In most states, workers' compensation laws are considered the sole remedy for workplace injuries and thus preclude employees from bringing a wide variety of tort claims against employers. Jurisdictions are split on whether state workers' compensation acts preclude intentional tort claims such as IIED.²⁸

However, even where an IIED claim against an employer is precluded by workers' compensation, it may be possible (although, in many cases, not practicable) to bring an action against a specific, offending co-worker.²⁹

E. Updating the study

In preparation for a forthcoming book on workplace bullying and American employment law, I am updating the IIED case study. Based on preliminary summaries of cases prepared by my research assistant, it appears that the state of the law is largely unchanged.

III. Discrimination claims

A. Discriminatory harassment

Harassment that is grounded in a target's membership in a protected class is actionable under both federal and state discrimination statutes. In particular, hostile work environment theory offers some potential relief to employees who are subjected to abusive treatment at work on the basis of protected class membership. For example, in *Lule Said v. Northeast Security*,³⁰ the Massachusetts Commission Against Discrimination took "judicial notice of the emerging body of law relative to 'workplace bullying'" in awarding damages to an employee who endured severe religious harassment because he practiced Islam.

The "Disaggregation" Problem

However, lawyers who are considering the use of statutory discrimination law as a potential means of legal relief for bullied employees are advised to consider the problem of "disaggregation" and whether it applies in their jurisdiction.

Law professor Vicki Schultz analyzed the evolution of sexual harassment law under Title VII and concluded that "the most prominent feature of hostile work environment jurisprudence" is the "disaggregation of sexual advances and other conduct that the courts consider 'sexual' in nature from other gender-based mistreatment that judges consider nonsexual."³¹ In other words, in considering sexual harassment lawsuits that allege the creation of a hostile work environment, the courts often disregard any harassing conduct that is not of a sexual nature. This line of analysis not only means that many horrible cases of sexual harassment are not considered in their factual entirety, but also precludes the application of

²⁸ *E.g., compare* Cole v. Fair Oaks Fire Protection Dist., 729 P.2d 743 (Cal. 1987) (finding that workers' compensation bars employee's IIED claim); *with* McSwain v. Shei, 402 S.E.2d 890 (S.C. 1991) (holding that workers' compensation act does not bar employee's IIED claim).

²⁹ *See e.g.,* Brown v. Nutter, McClennen & Fish, 696 N.E.2d 953 (Mass. App. Ct. 1998) (holding that co-workers "are not immunized from suit by the workers' compensation act for tortious acts which they commit outside the scope of their employment, which are unrelated to the interest of the employer").

³⁰ 2000 WL 33665354 (MCAD 2000).

³¹ Vicki Schultz, Reconceptualizing Sexual Harassment, 107 YALE LAW JOURNAL 1683, 1713-1714 (1998).

hostile work environment theory in bullying situations motivated by discriminatory animus where the hurtful conduct is of a primarily nonsexual nature.

Fortunately, some federal courts, in part responding to Schultz's critique, are permitting the introduction of evidence of non-sexual harassment in hostile work environment claims.³²

B. Disability discrimination

Disability discrimination statutes may offer some relief when abusive behavior has induced or exacerbated a recognized mental disability. Research conducted by University of Miami law professor Susan Stefan early in the history of the Americans with Disabilities Act showed that psychiatric disability claims grounded in factual allegations of workplace stress or mistreatment were unlikely to prevail.³³ Stefan explained that many employees "are losing their ADA cases because abuse and stress are seen as simply intrinsic to employment, as invisible and inseparable from conditions of employment as sexual harassment was twenty years ago."³⁴ Although the ADA was amended in 2008 to broaden the scope of statutory coverage, there is no evidence at present that these changes have rendered the law more applicable to workplace bullying.

IV. Retaliation and whistleblowing generally

Retaliation after filing some sort of internal or external complaint is one of the most frequently reported bullying tactics. Rebuffing sexual advances, reporting allegedly unethical business practices, and engaging in union organizing activity are examples of activities that could invite bullying behaviors as forms of retaliation. In such instances, various anti-retaliation and whistleblower protections may apply.

However, the scope of coverage of these provisions may vary greatly. For example, Title VII of the Civil Rights Act of 1964 provides anti-retaliation protection to anyone who "has opposed any practice, made an unlawful employment practice under this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title."³⁵ Federal courts interpreting this provision have held that the plaintiff must establish only a reasonable belief that the protested action was unlawful, not that it actually was unlawful.³⁶

By contrast, consider New York's whistle blower law, which prohibits an employer from taking retaliatory actions against employees who engage in whistle blowing activities on matters implicating legal violations that present "a substantial and specific danger to the public health or safety."³⁷ In *Border v. General Electric Co.* (1996), the New York Court of Appeals held that "a reasonable belief that a law, rule or regulation affecting public health and safety has been violated" was insufficient to invoke the statute.³⁸ Rather, "proof of an actual violation of

³² See e.g., *Williams v. General Motors Corp.*, 187 F.3d 553 (6th Cir. 1999) (non-sexual conduct can contribute to hostile work environment); *Durham Life Ins. v. Evans*, 166 F.3d 139 (3rd Cir. 1999) (same).

³³ Susan Stefan, "You'd Have to Be Crazy to Work Here": Worker Stress, The Abusive Workplace, and Title I of the ADA, 31 *LOYOLA LOS ANGELES LAW REVIEW* 795, 797-98 (1998).

³⁴ *Id.* at 844.

³⁵ 42 U.S.C. Sec. 2000e-3(a) (1994).

³⁶ See, e.g., *Berg v. LaCrosse Cooler Co.*, 612 F.2d 1041, 1046 (7th Cir. 1980); see also *Trent v. Valley Elec. Ass'n*, 41 F.3d 524, 526 (9th Cir. 1994).

³⁷ N.Y. Labor Law, Sec. 740 (McKinneys 1988).

³⁸ *Bordell v. General Elec. Co.*, 667 N.E.2d 922 (N.Y. 1996).

law” was required to sustain a whistle blower claim.³⁹ Of course, this means that under the New York statute, employees who are bullied in retaliation for filing a complaint would have to prove the merits of that complaint in order to claim protection.

V. Labor and collective bargaining statutes

Federal and state labor and collective bargaining laws are potential sources of protection for bullied workers, especially those covered by a collective bargaining agreement (CBA). They also create opportunities for unions to address bullying in a more pro-active manner. First, unions can bargain for provisions that protect members against abusive supervision. Second, even in the absence of specific protections against abusive supervision, the general rights granted in a CBA may provide legal protections for a bullied union member. Third, effective shop stewards can serve a valuable mediating role in a bullying situation.

Union and non-union employees alike may be able to invoke Section 7 of the National Labor Relations Act, which grants employees the right to engage in “concerted activity” for “mutual aid or protection.”⁴⁰ Invoking this provision, a group of non-union employees concerned about workplace bullying could approach their employer about it. However, the most common workplace bullying scenario involves a single targeted employee, often in a subordinate relationship to a bullying supervisor. In such a situation, the target’s non-litigious choices include doing nothing, confronting the bully, reporting the objectionable behavior to the bully’s superior, or in some way consulting and enlisting the assistance of her coworkers. Only the last scenario fits easily within the concerted activity provisions of the NLRA.

Jurisdictional Requirements

Workplace bullying frequently occurs in white collar and service sector settings. Accordingly, the NLRA’s limitations on the categories of workers who are statutorily protected may be relevant considerations. Expressly excluded from the NLRA’s protections are supervisors, independent contractors, domestic and agricultural workers, and family member employees.⁴¹ The Supreme Court has read the supervisory exemption so broadly that even registered nurses have been deemed excluded from statutory protection merely because they supervised nurses’ assistants.⁴² In addition, the Court has held that managerial and confidential employees are excluded as well.⁴³

Contract Provision

An example of a successful collective bargaining occurred in 2009, when Massachusetts unions affiliated with the Service Employees Union International and the National Association of Government Employees (SEIU/NAGE) and Commonwealth of Massachusetts agreed to include a “mutual respect” provision in their new contract that covered, among other things, bullying and abusive supervision. As a result, a CBA covering some 21,000 state workers includes this provision:

³⁹ *Id.* at 923.

⁴⁰ 29 U.S.C. Sec. 157. Section 8 of the NLRA states that employers may not “interfere with, restrain, or coerce” employees who are exercising this right. 29 U.S.C. Sec. 158.

⁴¹ 29 U.S.C. Sec. 152(3).

⁴² *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571 (1994)

⁴³ *See NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980) (exempting managerial employees); *NLRB v. Hendricks Co. Rural Elec. Membership Corp.*, 454 U.S. 170 (1981) (exempting confidential employees).

The Commonwealth and the Union agree that mutual respect between and among managers, employees, co-workers and supervisors is integral to the efficient conduct of the Commonwealth's business. Behaviors that contribute to a hostile, humiliating or intimidating work environment, including abusive language or behavior, are unacceptable and will not be tolerated. Employees who believe they are subject to such behavior should raise their concerns with an appropriate manager or supervisor as soon as possible, but no later than ninety (90) days from the occurrence of the incident(s). . . .

An alleged violation of the provision may be grieved, but it may not proceed to arbitration. This is a real limitation: It precludes a worker from obtaining an enforceable award or an order to stop the behavior. Nevertheless, it is a huge step forward to have a collective bargaining agreement that covers bullying and allows grievances to be filed when the behavior arises.

VI. Occupational safety and health laws

The federal Occupational Safety and Health Act of 1970 was enacted "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources."⁴⁴ Arguably, OSHA permits regulation of working conditions associated with stress and emotional abuse. OSHA's general duty clause states, "Each employer . . . shall furnish to each of [its] employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to [its] employees."⁴⁵ Professor Susan Harthill has argued persuasively that occupational safety and health law can be part of a multi-pronged approach that includes collaborative and cooperative efforts between public and private employment relations stakeholders.⁴⁶ Potentially, the most extreme effects of workplace bullying -- high blood pressure, heart attacks, etc. -- might meet the standard of "serious physical harm" within the meaning of the statute.

Even if certain types of workplace bullying could fall within the regulatory reach of OSHA, this statute is not well-suited to be the primary legal protection against workplace bullying. First, bullying, establishing that bullying is sufficiently serious so as to create the risk of "death or serious physical harm" would prove to be a difficult hurdle in many situations. Furthermore, adding workplace bullying to the list of concerns for a regulatory agency that already is severely understaffed would guarantee enforcement difficulties. It is unrealistic to believe that OSHA inspectors would be able to conduct adequate investigations about workplace bullying on a regular basis. Because OSHA does not provide for a private right of action,⁴⁷ bullied employees would depend solely on the government to invoke the statute's protections. Finally, the limited employer sanctions provided by OSHA would provide little economic incentive for employers to take preventive action.

⁴⁴ Occupational Safety and Health Act of 1970, 29 U.S.C. Sec. 651(b).

⁴⁵ 29 U.S.C. Sec. 654(a)(1).

⁴⁶ See Susan Harthill, *The Need for a Revitalized Regulatory Scheme to Address Workplace Bullying in the United States: Harnessing the Federal Occupational Safety and Health Act*, 78 UNIVERSITY OF CINCINNATI L. REV. 1250 (2010).

⁴⁷ See 29 U.S.C. Sec. 659.

VII. Free-speech protections

In limited instances, confronting an individual aggressor or reporting bullying conduct to a supervisor or human resources office may be a viable option. Unfortunately, if we assume that such acts would be construed legally as forms of speech, the law offers only limited protections to people who have engaged in this brand of self-help.

In the U.S., public employee speech is protected by the First Amendment, but only for expression on matters of public concern that does not involve an employee's job duties.⁴⁸ This is a difficult standard to meet in most everyday bullying scenarios, though it could have some application to whistleblower or retaliation situations.

For private-sector employees, there is little hope of invoking a constitutional right to free speech. A body of case law, consistent in result though very muddled in analysis, holds that employees enjoy no federal or state constitutional protection against incursions on free speech by private actors.⁴⁹ One state, Connecticut, provides general statutory protection for employee speech, though its application to bullying situations is apparently untested.

VIII. The Healthy Workplace Bill

The Healthy Workplace Bill provides a private cause of action for damages and injunctive relief to targets of severe workplace bullying and creates legal incentives for employers to act preventively and responsively toward these behaviors. It was drafted for the purpose of introducing at the state level, though its contents are adaptable to legislation, regulations, and collective bargaining agreements at all levels. The template version of the HWB has undergone several revisions over the years, with its core components remaining substantially intact. Obviously the text of the bill, once filed in state legislatures, has been subject to revision by its sponsors and legislative committees.

The following summary is based upon a revised version of the bill that will be submitted to state legislatures for the 2013-14 sessions.⁵⁰

A. Primary cause of action

The Healthy Workplace Bill defines its basic cause of action this way:

It shall be an unlawful employment practice under this Chapter to subject an employee to an abusive work environment as defined by this Chapter.

As is often the case with protective legislation, the details that shape and limit the cause of action are contained in definitions and other provisions. The critical definition in this cause of action is "abusive work environment," which:

exists when an employee or employer, acting with intent to cause pain, injury, or distress to an employee, subjects the employee to abusive conduct that causes physical harm, psychological harm, or both to the employee.

Abusive conduct is defined as:

⁴⁸ See *Connick v. Myers*, 461 U.S. 138 (1983) (articulating public concern test); *Garcetti v. Ceballos* 547 U.S. 410 (2006) (excluding from constitutional protection public employee speech pursuant to official job duties).

⁴⁹ For more information on speech protections for private sector employees, see David C. Yamada, *Voices From the Cubicle: Protecting and Encouraging Private Employee Speech in the Post-Industrial Workplace*, 19 *BERKELEY JOURNAL OF EMPLOYMENT & LABOR LAW* 1 (1998).

⁵⁰ Contact the author for this version.

... acts, omissions, or both, that a reasonable person would find abusive, based on the severity, nature, and frequency of the conduct. Abusive conduct may include, but is not limited to: repeated infliction of verbal abuse such as the use of derogatory remarks, insults, and epithets; verbal or physical conduct of a threatening, intimidating, or humiliating nature; the sabotage or undermining of an employee's work performance; or attempts to exploit an employee's known psychological or physical vulnerability. A single act normally will not constitute abusive conduct, but an especially severe and egregious act may meet this standard.

The decision to use a reasonableness standard for determining what constitutes abusive conduct was an easy one, drawn from Supreme Court's 1993 decision in *Harris v. Forklift Systems, Inc.* defining a hostile work environment for sexual harassment under Title VII of the Civil Rights Act.⁵¹

The bill is, in significant part, a response to the severe strictures of the tort of intentional infliction of emotional distress, in that it does not require that the complained-of behavior be "outrageous" and "beyond the bounds of civilized society" in order to be actionable.⁵² Instead, it consciously aligns itself with Supreme Court dicta explaining the nature of a hostile work environment under Title VII. However, unlike Title VII jurisprudence, in which the parameters of hostile work environment doctrine are judicially defined rather than included in the statute, the Healthy Workplace Bill expressly includes illustrations of the kind of conduct that may, in the aggregate, be considered actionable. These examples are drawn from the Supreme Court's definition of a hostile work environment under Title VII and the behavioral research on bullying behaviors. This is intended as a clear signal to courts and juries that this bill is not to be mistaken for a statutory adoption of IIED jurisprudence.

B. Employer liability

The Healthy Workplace Bill imposes a strict liability standard upon employers for actionable behavior:

An employer shall be vicariously liable for an unlawful employment practice, as defined by this Chapter, committed by its employee.

However, it also provides employers with an affirmative defense when:

1. the employer exercised reasonable care to prevent and correct promptly any actionable behavior; and,
2. the complainant employee unreasonably failed to take advantage of appropriate preventive or corrective opportunities provided by the employer.

This framework is drawn directly from the U.S. Supreme Court's 1998 companion decisions concerning employer liability for sexual harassment, *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*.⁵³ The defense is not available when the actionable behavior

⁵¹ *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). The Court promulgated a two-part test to determine whether a hostile work environment is present. First, the conduct must create "an environment that a reasonable person would find hostile or abusive."⁵¹ Second, the victim must "subjectively perceive the environment to be abusive."⁵¹ In analyzing the objective prong of the test, the frequency and severity of the discriminatory conduct, whether the conduct was "physically threatening or humiliating, or a mere offensive utterance," and whether the conduct "unreasonably interfere[d] with an employee's work performance," are among the factors that will be considered.

⁵² *C.f.*, Restatement (Second) of Torts, Sec 46, *supra* note --.

⁵³ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). In both cases, the Court held that an "employer is subject to vicarious liability to a victimized employee for an actionable hostile work environment

culminates in an adverse employment decision.⁵⁴

C. Other significant provisions

1. Damages

The Healthy Workplace Bill provides for standard forms of compensatory and injunctive relief, as well as for punitive damages and attorney's fees,⁵⁵ largely mirroring damages commonly awarded in successful tort and employment discrimination claims, the two doctrinal areas that have most informed its drafting. Two additional provisions are noteworthy. First, a court may order "removal of the offending party from the complainant's work environment."⁵⁶

This is included out of a sense of fairness to the severely bullied employee, who should not have to change jobs, departments, or offices in order to avoid working with or for the offending co-employee or co-employees, which is an unfortunate "resolution" of so many sexual harassment situations.

Second, the bill provides safeguards against runaway verdicts for emotional distress and punitive damages:

Where an unlawful employment practice under this Chapter did not include an adverse employment action, an employer shall be subject to damages for emotional distress only when the actionable conduct was extreme and outrageous, and it shall not be subject to punitive damages. This provision does not apply to individually named employee defendants.

This is the only provision of the bill that expressly adopts the high standard of IIED in order to recover damages for emotional distress. In effect, when bullying behaviors have stop short of expressly implicating the plaintiff's job security and compensation, the availability of emotional distress damages are subject to the IIED standard, and punitive damages are not available.

The damage limitations serve as powerful incentives for employers to stop bullying behaviors before they intensify and lead to events that could open the door to significant emotional distress and punitive damages. One of the most common laments from bullying targets who reported the behavior to their employer is that complaints either were ignored or the employer made the situation even worse. This also has the effect of discouraging extensive litigation and promoting quick resolution.

2. Private Right of Action

The Healthy Workplace Bill is enforceable "solely by a private right of action."⁵⁷ Plaintiffs will file their claims directly in a state trial court. The bill does not contemplate the creation or involvement of a state administrative agency for adjudicating or deciding claims.

3. Anti-Retaliation Protection

created by a supervisor with immediate (or successively higher) authority over the employee."⁵³ The Court then promulgated a two-element affirmative defense available to employers where no tangible employment action⁵³ had been taken: First, the employer must establish that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior."⁵³ Second, the employer must establish that the "plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."⁵³

⁵⁴ *Id.*

⁵⁵ Mass. Senate No. 699, Sec. 7.

⁵⁶ *Id.* at 7(a).

⁵⁷ *Id.*, Sec. 8(a).

The Healthy Workplace Bill provides anti-retaliation protection:

It shall be an unlawful employment practice under this Chapter to retaliate in any manner against an employee because she has opposed any unlawful employment practice under this Chapter, or because she has made a charge, testified, assisted, or participated in any manner in an investigation or proceeding under this Chapter, including, but not limited to, internal complaints and proceedings, arbitration and mediation proceedings, and legal actions.

This is standard anti-retaliation language, drawn from federal employment discrimination statutes.⁵⁸ Obviously if potential complainants and witnesses are not protected against retaliation, the preventive and remedial objectives of the bill are severely compromised. The major addition is express coverage of “internal complaints and proceedings.” This provision reflects the legal significance of employer policies that contain in-house grievance procedures. It also supports the policy objective of encouraging early, internal resolution of bullying problems by not requiring targets of bullying to file a legal claim in order to be protected against retaliation.

4. Additional Affirmative Defenses

The Healthy Workplace Bill provides three other affirmative defenses that are designed to protect employer prerogatives:

It shall be an affirmative defense that:

- a. The complaint is based on an adverse employment decision reasonably made for poor performance, misconduct, or economic necessity;
- b. The complaint is based on a reasonable performance evaluation;
- or
- c. The complaint is based on a defendant’s reasonable investigation about potentially illegal or unethical activity.

These defenses are included to discourage use of the Healthy Workplace Bill as a “backdoor” attempt to create a just cause requirement for termination. Although I am sympathetic to the argument that the law should provide such protections to employees, that should be addressed by a separate statutory measure or collective bargaining.

D. Responses to the Healthy Workplace Bill

On May 12, 2010, the New York State Senate passed the Healthy Workplace Bill by a 45-16 vote that included strong bipartisan support.⁵⁹ The lead Senate sponsor was a high-seniority Republican who learned about workplace bullying from a constituent who had been targeted at her place of employment. Unfortunately for the bill’s supporters, it stalled in the State Assembly. However, the Senate vote in a state that is home to national media outlets resulted in unprecedented attention to workplace bullying legislation.

The New York vote marked the second time that spring that the Healthy Workplace Bill had passed a state legislative floor vote. On March 18, 2010, a version of the Healthy Workplace Bill covering public employees was approved by the Illinois State Senate by a

⁵⁸ See Age Discrimination in Employment Act, 29 U.S.C. Sec. 623(d); Americans with Disabilities Act, 42 U.S.C. Sec. 12203(a); Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e-3.

⁵⁹ Office of Senator Thomas P. Morahan, Senate Passes Landmark Legislation to Halt Bullying in the Workplace (May 13, 2010) (news release, copy on file with author); Cohen, *supra* note – (reporting 45-16 vote).

35-17 vote.⁶⁰ That measure, too, was not brought to a vote in the other house of the legislature.

The approval by the New York State Senate apparently triggered a lot of attention. In July 2010, *Parade* magazine, a syndicated periodical distributed with Sunday editions of newspapers across the country, ran a short piece inviting readers to vote yes or no on the question, “Should workplace bullying be illegal?,” in an online poll.⁶¹ Support for legal protections was overwhelming, as some 93 percent of respondents voted yes.⁶²

Days after the *Parade* piece appeared, *Time* magazine posted to its website an article examining the pros and cons of enacting the Healthy Workplace Bill.⁶³ The internet site Yahoo! carried the story on its home page the same day.⁶⁴ Within days, over 1,600 comments were posted to the two websites, many of which shared personal stories of being bullied at work and expressed support for the legislation.⁶⁵

In a 2011 guest column on workplace bullying in the *New York Law Journal* -- the daily newspaper for the legal profession in New York State -- two management-side employment lawyers wrote:

Therefore, it appears that we may be on the cusp of a new era of legislation and legal precedent targeted at preventing and punishing workplace bullying.

Indeed, it seems inevitable that some form of the HWB will become law, whether in New York or elsewhere, and that once the first state adopts an anti-bullying statute other will shortly follow.⁶⁶

A decade ago, such an observation, especially by lawyers representing employers, would have been unthinkable. Initial reactions to the possible enactment of workplace anti-bullying legislation were politely skeptical or downright dismissive.⁶⁷ In recent years, however, responses to this possibility have changed considerably. As the Healthy Workplace Bill has been introduced in more state legislatures, however, interest has grown, with some lawyers anticipating eventual enactment.⁶⁸

Advocacy Movement

The core supporters of the legislation have affiliated with small, volunteer-driven groups known as “Healthy Workplace Advocates,” operating and forming in states across the country. Some of the groups, such as New York and Massachusetts, are fairly well

⁶⁰ Illinois Healthy Workplace Bill, bill history, at <http://www.healthyworkplacebill.org/states/il/illinois.php>.

⁶¹ Janet Kinoshian, Workplace Bullying: Do We Need a Law?, *PARADE* (July 18, 2010), at <http://www.parade.com/news/intelligence-report/archive/100718-workplace-bullying-do-we-need-a-law.html>.

⁶² *Id.* (poll results as of July 25, 2010).

⁶³ Adam Cohen, New Laws Target Workplace Bullying, *TIME* (July 21, 2010), at <http://www.time.com/time/nation/article/0,8599,2005358,00.html>.

⁶⁴ Adam Cohen, New York Bill Targets Abusive Bosses (July 21, 2010), http://news.yahoo.com/s/time/20100721/us_time/08599200535800.

⁶⁵ Cohen, *supra* note --, at http://news.yahoo.com/s/time/20100721/us_time/08599200535800 (1,595 posted comments as of July 25, 2010); Cohen, *supra* note --, at <http://www.time.com/time/nation/article/0,8599,2005358,00.html> (76 posted comments as of July 25, 2010).

⁶⁶ Jason Habinsky and Christine M. Fitzgerald, Office Bully Takes One on the Nose: Developing Law on Workplace Abuse, *NEW YORK LAW JOURNAL* (Jan. 21, 2011).

⁶⁷ See generally Ana Marie Cox, Is Your Office Bullyproof?, *MOTHER JONES* 61-62 (May-June 1999) (expressing skepticism about potential legislation).

⁶⁸ See Judy Greenwald, Workplace Bullying Threatens Employers, *BUSINESS INSURANCE* (June 10, 2010) (quoting law firm partners on the inevitability of workplace bullying legislation); Valeri S. Pappas & Gregory F. Szydlowski, Workplace Bullying Legislation – A Primer for Colorado Employers and Employees, *TRIAL TALK*, June/July 2008, 39 (discussing implications of passage of the Healthy Workplace Bill).

organized and have been functioning for several years. Others are just getting off the ground. Many of these groups have been launched by individuals who have either experienced or witnessed bullying and its effects.

It is a sign of the growing awareness of workplace bullying that among the institutional stakeholders are organizations with significant visibility and political clout. In recent years, public employee unions have become especially receptive to workplace bullying legislation. For example, in New York State, unions supporting the legislation have included the Public Employees Federation, New York State United Teachers, Civil Service Employees Union, and Professional Staff Congress.

In Massachusetts, a union local affiliated with the Service Employees International Union/National Association of Government Employees has taken a lead role in advocating for the Healthy Workplace Bill. Civil rights and women's rights groups have emerged as sources of organizing and lobbying support for the legislation as well. The National Association for the Advancement of Colored People and Business and Professional Women are among the organizations that have supported the enactment of workplace bullying legislation.⁶⁹

Employment Practices Liability Insurance

In 2011, an insurance industry newsletter published by PropertyCasualty360.com reported that some employers are requesting that insurance companies include workplace bullying in their employment practice liability insurance (EPLI) policies. EPLI policies have become a fact of life in corporate America, and it makes sense that the insurance industry would be discussing the potential impact of workplace bullying legislation. Furthermore, it is a sign of the growing strength of the movement to enact the Healthy Workplace Bill that employers and their insurance companies are anticipating its passage. If the HWB becomes law, lawsuit negotiations will be influenced by insurance coverage of bullying-related disputes.

Criticisms of the Healthy Workplace Bill

Opposition to the Healthy Workplace Bill has come primarily from state chapters of the Chamber of Commerce, the Society for Human Resource Management, and from management-side employment lawyers. Specific criticisms have ranged from practical legal concerns to ideological objections. First, some critics have posited that a workplace bullying law will create a groundswell of frivolous litigation. This is a reasonable concern, but typically these critiques have overlooked numerous provisions in the Healthy Workplace Bill that limit its reach to severe cases of workplace bullying. These include a requirement that plaintiffs establish intent to cause distress and to show actual harm; a higher standard for proving emotional distress damages in cases that did not involve a negative employment decision; and express preservation of traditional employer prerogatives such as conducting employee evaluations, thus precluding an employee from raising a claim over a fair but negative performance appraisal.

Concededly, when the Healthy Workplace Bill is enacted in a given state, there probably will be an initial surge of claims. However, as these cases wind their way through

⁶⁹ See Resolutions, THE CRISIS, Fall 2008, 50 (reporting on enacted resolution calling upon all NAACP units to support workplace bullying legislation); <http://www.brevardbpw.org/newsletters/v4i7.pdf> (chapter newsletter of Business and Professional Women reporting adding workplace bullying to the national legislative agenda).

the court systems, it soon will become apparent that the requirements of proving malice and actual harm make for a stiff legal threshold in order for individuals to prevail. Ultimately, the most valuable function played by the Healthy Workplace Bill will be a preventive one, in that employers will have a strong legal incentive to be pro-active in preventing these situations from occurring.

Second, some critics have argued that existing law, especially tort law and discrimination law, already provides a sufficient legal response to workplace bullying. My extensive analysis of tort claims such as intentional infliction of emotional distress (summarized in Part II above) easily refutes that assertion. At present, only claims that threaten or involve physical violence, or claims that expressly raise mistreatment based on protected class membership, fall comfortably within existing tort law. In addition, workers' compensation preempts tort claims against employers in many states. Furthermore, discrimination law requires a plaintiff to show that the objectionable conduct was motivated by her protected class status. Such motivation often is far from clear in bullying cases, even when the complainant is protected under discrimination law.

A third type of argument against workplace bullying legislation is grounded in a defense of competition and the free market. In a sharp criticism of the Healthy Workplace Bill, management-side employment lawyers Timothy Van Dyck and Patricia Mullen closed their commentary by claiming that protections against malicious, harmful mistreatment at work are somehow contrary to high performance expectations for workers and healthy competition.⁷⁰ They posited that "tension created by competition" fuels productivity at work, and the Healthy Workplace Bill "would not only inhibit productivity and employers' freedom to hire and fire at-will employees but moreover, it would chill critical workplace communication."⁷¹ They continued:

The United States has always prided itself on its rugged, even idiosyncratic, individualism. At a time when corporate America at least purports to celebrate diversity in the workplace, it is ironic that legislation is being considered which, if passed, would serve to clone workplace behavior. . . . (I)t is those who push us to excel to whom we often owe our greatest debt of gratitude. By labeling pushing as 'bullying,' there exists a profound risk that high expectations go by the boards and employees are denied real opportunities for advancement.⁷²

IX. Other law and policy initiatives

A. Grand jury reports

Grand juries typically are associated with criminal proceedings, whereby citizen jurors are assembled to consider whether there is sufficient evidence to issue a criminal indictment.

A less familiar function for county-level grand juries is that of an overseer or monitor of county government and municipalities within a county, vested with some investigative powers. In this setting, a grand jury may serve as a fact finder and issue recommendations

⁷⁰ Timothy P. Van Dyck and Patricia M. Mullen, *Picking The Wrong Fight: Legislation That Needs Bullying*, 3 No. 11 MEALEY'S LITIGATION REPORT 1, 3 (June 2007) (predicting "a huge uptick in employment lawsuits were this legislation to pass").

⁷¹ *Id.*

⁷² *Id.*

as this one did, but that typically is the extent of its authority. Nevertheless, this is an encouraging development for the anti-bullying movement. The reach of grand jury report may be limited — after all, their findings and recommendations apply only to certain government employees within the county and carry little enforcement power — but they serve as a valuable tool for public education locally and beyond.

Ventura County, California (2011)

In 2011, a Ventura County, California grand jury issued a report finding that workplace bullying is a serious problem in county government and recommending that the county Board of Supervisors adopt an anti-bullying policy and collect information on bullying in county government offices.⁷³ The investigation was triggered by a public complaint, leading to a 33-page report containing these main findings:

The Grand Jury found that bullying is occurring in County government and that the County has no anti-bullying policy. Employees have escaped from bullying by leaving their County positions. These employees did not file complaints of bullying because they perceived they could not get a fair and impartial investigation into their complaints. They felt their situation would worsen if their identities became known.

Riverside County, California (2012)

In 2012, a Riverside County grand jury issued a report finding that “workplace bullying by supervisors and managers has become pervasive” in two large programs within the county’s human resources department.⁷⁴ The report found that supervisory bullying “is causing fear and intimidation among employees, as reported in seven complaints.” It further observed that the “County has no written policy or employee training specifically directed against bullying the workplace.” Some employees testified that they escaped the bullying “by leaving their positions, while others testified they feel trapped in the positions and fear termination.” The grand jury recommended, among other things, the adoption of “written policies and procedures” concerning workplace bullying for the affected departments, the adoption of an anti-bullying policy for all county employees, and the creation of strong reporting and enforcement mechanisms.

B. Ballot measures

Advocates for greater legal protections against workplace bullying generally have eschewed ballot measures as a possible avenue toward legal reform, but in 2004 the personal initiative of one Massachusetts citizen illustrated how it could be done. After attending a public forum on workplace bullying in the town of Amherst, Paul Piwko decided to take action, and he decided to collect draft and collect signatures for a ballot measure that would instruct the state representative to introduce legislation (1) declaring workplace bullying “to be an occupational safety and health issue”; (2) mandating a statewide study on the impact of workplace bullying on individuals, the healthcare system, and insurance rates; and, (3) requiring employers with 50 or more workers to adopt a policy on workplace

⁷³ Ventura County Grand Jury 2010-11, Final Report: Bullying in the Workplace (May 24, 2011), at http://portal.countyofventura.org/portal/page/portal/Grand_Jury/Reports/TAB2010-11/Bullying_in_the_Workplace_Final_Report.pdf.

⁷⁴ Riverside County, 2011-2012 Grand Jury Report, Riverside County Human Resources Department 2 (June 13, 2012).

bullying.⁷⁵ At the November 2004 general election, the ballot measure was approved by over a two-to-one margin, with 8,178 votes in favor and 3,850 opposed.⁷⁶

The district's state representative, Rep. Ellen Story, was very receptive to the ballot measure and introduced a bill consistent with its specifications in the next legislative session.

That bill and a virtually identical successor would not get out of committee. However, Rep. Story's interest in the workplace bullying issue would continue, and eventually she became a primary sponsor of the Healthy Workplace Bill.

C. Proclamations

In 2011, over two dozen U.S. cities, towns, and counties issued proclamations endorsing Freedom from Workplace Bullies Week, an event created by the Workplace Bullying Institute.⁷⁷ In 2012, over one hundred local government entities issued proclamations. The proclamations were the result of outreach by grassroots activists from Healthy Workplace Advocates groups across the country. Although they lack any legal authority, they serve as evidence of growing awareness of workplace bullying and potential receptivity to legal interventions.

D. Professional accreditation standards

As workplace bullying more fully enters the mainstream of American employee relations concerns, it is possible that non-governmental regulators may become more influential in addressing it. The most significant example to date is the Joint Commission, an independent, non-profit organization that accredits health care organizations and programs, has entered the fray. In 2008, the Joint Commission issued a standard on intimidating and disruptive behaviors at work, citing concerns about patient care:⁷⁸

Intimidating and disruptive behaviors can foster medical errors, contribute to poor patient satisfaction and to preventable adverse outcomes, increase the cost of care, and cause qualified clinicians, administrators and managers to seek new positions in more professional environments. Safety and quality of patient care is dependent on teamwork, communication, and a collaborative work environment. To assure quality and to promote a culture of safety, health care organizations must address the problem of behaviors that threaten the performance of the health care team.

Two leadership standards are now part of the Joint Commission's accreditation provisions: The first requires an institution to have "a code of conduct that defines acceptable and disruptive and inappropriate behaviors." The second requires an institution "to create and implement a process for managing disruptive and inappropriate behaviors."

⁷⁵ Commonwealth of Massachusetts, Application for a Public Policy Question, 3rd Hampshire District (petition form on file with author).

⁷⁶ http://www.boston.com/news/special/politics/2004_results/general_election/questions_all_by_town.htm

⁷⁷ David Yamada, "Cities, towns, and counties support Freedom from Workplace Bullies Week 2011," *Minding the Workplace* (Oct. 18, 2011), at

<http://newworkplace.wordpress.com/2011/10/18/cities-towns-and-counties-proclaim-support-for-freedom-from-workplace-bullies-week-2011-2/>.

⁷⁸ http://www.jointcommission.org/assets/1/18/SEA_40.PDF

Sources

This report drew from the following sources:

David C. Yamada, *Workplace Bullying and American Employment Law: A Ten-Year Progress Report and Assessment*, 32 *COMPARATIVE LABOR LAW & POLICY JOURNAL* 251 (2010) (symposium contribution).

David C. Yamada, *Crafting a Legislative Response to Workplace Bullying*, 8 *EMPLOYEE RIGHTS AND EMPLOYMENT POLICY JOURNAL* 475 (2004) (symposium contribution).

David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 *GEORGETOWN LAW JOURNAL* 475 (2000).

[Copies of the articles above may be freely downloaded from this site:

http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=506047]

MINDING THE WORKPLACE blog (<http://newworkplace.wordpress.com>), by David Yamada

Forthcoming symposium essay in the *TEMPLE POLITICAL & CIVIL RIGHTS LAW REVIEW* and forthcoming book on workplace bullying and American law.

Name List of Participants

<positions as of February 2013>

I. Speakers <in order of presentation>

- | | |
|----------------------------------|--|
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